Supreme Court, U.S.
FILED
JAN 27 2006
OFFICE OF THE CLERK

05-962

In the Supreme Court of the United States

MARC HOUK, Warden,

Petitioner,

v.

GREGORY LOTT *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

When a court evaluates a claim by a federal habeas petitioner that he is "actually innocent" of the crime (or sentence), under *Schlup v. Delo*, 513 U.S. 298 (1995) and/or *Herrera v. Collins*, 506 U.S. 390 (1993), the court must consider, per *Schlup*, "all the evidence," including evidence "that was either excluded or unavailable at trial." 513 U.S. at 327–28. The question presented is: Whether such a petitioner waives his attorney-client and work-product privileges regarding either statements the petitioner made to his former counsel or other evidence relevant to his actual innocence?

LIST OF PARTIES

The Petitioner is Marc Houk, the Warden of the Ohio Penitentiary at Youngstown.

The petitioner below, Gregory Lott, is an inmate of the Ohio Penitentiary, and a Respondent here. Because this case involves a mandamus action, the United States District Court for the Northern District of Ohio is also a Respondent here.

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PETITION

The Attorney General of Ohio, on behalf of Marc Houk, the Warden of the Ohio Penitentiary in Youngstown, Ohio ("Ohio"), respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case granting mandamus against the district court's order allowing discovery.

OPINIONS BELOW

The United States Sixth Circuit Court of Appeals Opinion is reproduced at App. 1a–33a. The United States District Court for the Northern District of Ohio's Memorandum of Opinion and Order is reproduced at App. 34a–63a. The opinion of the Sixth Circuit authorizing Lott to file a second habeas petition appears at App. 83a–94a. The opinion of the Ohio Court of Appeals affirming the denial of Lott's second post-conviction relief petition is reproduced at App. 96a–113a. The Sixth Circuit's opinion denying Lott's first federal habeas petition appears at App. 114a–66a. The Ohio Supreme Court's opinion on direct appeal is reproduced at App. 167a–99a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals issued its opinion granting mandamus on September 9, 2005. The Warden sought and obtained an extension of time through January 27, 2006 to file a petition for certiorari to this Court. See App. 64a. The Warden timely filed his petition within the time allowed by that extension. The Warden invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix included with this brief.

INTRODUCTION

The decision below rejected the possibility that habeas petitioners who assert an "actual innocence" claim under *Schulp v. Delo*, 513 U.S. 298 (1995), impliedly waive the attorney-client and work-product privileges regarding contentions raised in their claims. Review of this issue is warranted now, because the ruling below threatens to undermine the finality of state court convictions and encourage proliferation of actual innocence claims as just one more habeas litigation tactic. Thus, this case merits this Court's consideration even though the federal courts of appeals other than the Sixth Circuit have yet to weigh in on the issue.

The Sixth Circuit below granted a writ of mandamus against the district court, which had granted in part the State's discovery request in Respondent Gregory Lott's second federal habeas action. The Sixth Circuit majority concluded that the district court had "clearly erred" in concluding that Lott had impliedly waived the attorney-client and work-product privileges as to his former counsel's notes, documents, and conversations with Lott, about the matters Lott raised in his verified habeas petition. Specifically, in his second petition, Lott contended that a police officer had fabricated Lott's confession nearly twenty years ago, and Lott also claimed that he was actually innocent based on exculpatory evidence that the prosecutor allegedly failed to disclose to Lott's trial counsel at Lott's original trial. The Warden sought discovery regarding whether Lott's trial counsel knew of the exculpatory information at trial, either

from the prosecutor or from another source, and whether Lott ever admitted to his former counsel Lott's role in the crime or his 1986 confession to police.

In overturning the district court's order pertaining to the privilege waiver, the Sixth Circuit held that although this Court's decision in *Schlup v. Delo* requires consideration of "all the evidence" in determining an actual innocence claim, regardless of its admissibility at trial, *Schlup* did not curtail the rules of attorney-client and work-product privilege. App. 16a–17a. The Sixth Circuit expressed concern that an implied waiver in the context of actual innocence claims would undermine the attorney-client privilege in other areas as well.

The Sixth Circuit's decision warrants review for four reasons. First, the decision below effectively allows habeas petitioners asserting actual innocence claims to hide the most relevant evidence as to their innocence. In defending against actual innocence claims, States must be permitted to ask about documents or statements that support or refute those claims, including statements that the habeas petitioner made to his former trial counsel. But if habeas petitioners know that they can maintain their innocence while withholding the best evidence relevant to their innocence, actual innocence claims are likely to be filed with increasing regularity, despite the Court's admonition that such claims are reserved for the "truly deserving." *Schlup*, 513 U.S. at 321. That prospect threatens to impinge upon the comity between federal and state courts in review of state convictions, and undermine the finality of those convictions.

Second, the Sixth Circuit's ruling is inconsistent with *Schlup*'s direction that when a court evaluates an "actual innocence" claim, the court must consider that contention "in light of all the evidence" relevant to a habeas petitioner's guilt or innocence. *Id.* at 328. *Schlup* focused on evidence *relevant* to *factual* guilt or innocence, not legal insufficiency. *Schlup*'s "all-the-evidence" mandate includes evidence that

was "excluded or unavailable at trial." *Id.* at 328. Thus, for example, it is not enough for a habeas petitioner claiming actual innocence to dismiss inculpatory evidence as having been obtained illegally. That evidence must be considered, as well as its reliability. In short, when federal courts undertake a *Schlup* "actual innocence" inquiry, the usual rules of admissibility are put aside. For similar reasons, the claimant's attorney-client and work-product privileges also must yield to the extent that otherwise privileged matters directly relate to contentions made in support of "actual innocence." An implied waiver of privilege in this context is consistent with *Schlup*, and with Fed. R. Evid. 501's direction that federal courts are to determine the scope of privilege "in the light of reason and experience."

Similarly, the ruling below is inconsistent with the understanding that a habeas petitioner asserting his actual innocence surrenders many of the constitutional privileges relating to trial. For example, the Court in *Schlup* cited an article opining that evidence seized in violation of the Fourth Amendment should be considered in determining actual innocence. 513 U.S. at 328 n.46. If relevant evidence obtained in violation of Fourth, Fifth, or Sixth Amendment privileges can be considered in evaluating an actual innocence claim, then relevant evidence claimed to be protected by the habeas petitioner's attorney-client privilege ought in fairness to be considered as well.

Third, even putting aside the *Schlup* aspect of the claim here, the decision below also muddies the law about implied waiver of attorney-client privilege more generally. Case law implying a waiver of the privilege in other contexts strongly suggests that an implied waiver of the privilege is appropriate when a claimant has directly put privileged material at issue by his contentions and the opposing party in fairness ought to have access to that material to defend against the specific contentions. *Schlup*'s mandate to consider "all the evidence"

regarding "actual innocence" underscores the appropriateness of that result here.

Finally, review is warranted here because the decision below presents difficulties for States defending against actual innocence claims. If States are prevented from obtaining and presenting relevant evidence that may well refute a habeas petitioner's "innocence" claim, it will be difficult for courts to limit relief to the "truly deserving." State convictions may be undone, even when evidence exists that would have confirmed the petitioner's guilt. Such a result interferes with the finality of State court convictions, and the comity between the state and federal courts.

For these and other reasons, review should be granted.

STATEMENT OF THE CASE

A. Gregory Lott burglarized John McGrath's house, tied up the eighty-two-year-old McGrath and set him on fire, causing McGrath's eventual death.

In 1987, an Ohio court convicted Gregory Lott of aggravated murder. The court determined that he killed eighty-two-year-old John McGrath by pouring lamp oil over him and setting him on fire after tying him up, and that Lott did so during the course of burglarizing McGrath's house and robbing McGrath.

Based on their investigation, the police determined that Lott had entered McGrath's house in July 1986, robbed and burned McGrath, burglarized the home, and stolen McGrath's car. Police discovered Lott's involvement in the attack upon McGrath by a tip from Deidra Coleman, an eyewitness who saw a man waiting in a car and behaving suspiciously. The man Ms. Coleman saw waited in the car for several hours outside Coleman's neighbor's (Mrs. Turk's) house. Coleman saw the man enter the house, and he ran out a few minutes later carrying a bag of cash. Ms. Coleman

carefully observed the license plate of the car and the man driving it, and called the police. App. 115a–16a.

Police then went to McGrath's house, after tracing the car Coleman saw to McGrath. When no one responded, the police left the house. Police returned the following day, entered through an unsecured door, and found McGrath lying on the floor, badly burned, with putrefying wounds. The police took McGrath to the hospital. A piece of cord and some burned paper was lying next to him. *Id.* at 116a–17a. Shortly after he was taken to the hospital, McGrath described his assailant to police. In his statement to police, McGrath said that he had seen his attacker before, and that the man was about six feet tall, had a light black complexion, long straight hair, white-gray tennis shoes, and was wearing a cap without a bill. *Id.* at 117a, 155a. (Lott now claims that his trial counsel were not aware of McGrath's description. See Lott's Second Habeas Pet., Br. at 5.) McGrath died at the hospital eight days after giving his statement. App. 117a.

Later, Coleman, the eyewitness who had spotted McGrath's car, identified Lott from a photo array as the man she had seen in (McGrath's) car. Police saw Lott on July 30, and arrested him then. *Id.* at 111a. Police found light-colored tennis shoes in the trunk of Lott's car when Lott was arrested. *Id.* at 155a.

After the 1986 assault upon McGrath, police found Lott's fingerprints in McGrath's house, including on a church collection envelope that McGrath had received at most one month before the murder. Those fingerprints also matched fingerprints found in McGrath's house after his home was burglarized three years earlier, in 1983. (The burglar had not been identified in 1983.) A shoeprint at the scene of the crime was consistent with Lott's tennis shoes. An uncapped, partially-used bottle of lamp oil was found on McGrath's dresser, near where McGrath had been found. *Id.* at 117a–18a.

After Lott was apprehended, he confessed to Detective Hughey of the East Cleveland police. Lott admitted that he had burglarized the house, and had tied up McGrath. During this interview, Lott began crying, and said he did not mean to hurt McGrath. Lott told Detective Hughey that Lott did not remember setting McGrath on fire. *Id.* at 160a. Lott's confession was suppressed at trial, as Lott's counsel was not present during the detective's post-indictment interview with Lott. See *id.* at 161a; Suppression Hr'g Tr. 513, 661–62.

B. A state court three-judge panel convicted Lott and sentenced him to death.

Based on the fingerprints, physical evidence, and eyewitness testimony, a grand jury indicted Lott for aggravated murder. The indictment specified that Lott had committed the aggravated murder in the course of committing burglary and robbery—a capital offense under Ohio law. See Ohio Revised Code ("O.R.C.") §§ 2903.01 & 2929.02. The indictment further charged Lott with aggravated burglary, aggravated robbery, aggravated arson, and kidnapping. (The kidnapping charge was later dropped.)

Lott waived his right to a jury trial, and the trial proceeded before a three-judge panel. (Ohio law requires three-judge panels for bench trials involving a capital charge. See O.R.C. § 2929.03(C)(2)(b).) Lott did not testify at trial, but his attorneys argued that that there was insufficient evidence linking Lott to the crime, and suggested that McGrath may have accidentally set himself on fire. App. 159a. The prosecutor argued that Lott had brought lamp oil to McGrath's house and set him on fire with it, and that there was nothing in McGrath's house that used kerosene or lamp oil. Trial Tr. at 778. The prosecutor apparently had learned from a police investigator shortly before the trial that an oil-burning lamp had been found in pieces in McGrath's home after McGrath died. Lott's Second Habeas Pet., Ex. D. (Lott now claims that the prosecutor had not told his trial counsel

that an oil lamp had been found in McGrath's home.) At the end of the trial, the three-judge panel unanimously convicted Lott on all remaining counts of the indictment. After a separate sentencing hearing at which Lott presented mitigation evidence, the panel unanimously imposed the death penalty.

C. Lott challenged his conviction on direct appeal, in state post-conviction proceedings, and federal habeas.

The Ohio Court of Appeals and the Ohio Supreme Court affirmed Lott's conviction on direct appeal. The state Supreme Court concluded that:

> In this case, the prosecution proved beyond dispute the existence of certain highly probative circumstantial evidence. Lott was indisputably linked to the victim's home by Lott's unexplained possession of the victim's car, by Lott's fingerprints at two separate locations in McGrath's home, and by a shoeprint on the floor of the victim's house consistent with Lott's gym shoes. From these facts and from the other physical evidence of the scene established by the prosecution, there was sufficient probative evidence from which reasonable minds could conclude, as the trial panel did, that Lott robbed, set fire to and purposely killed McGrath, and burglarized his home.

App. 181a–82a.

Finding that the evidence of Lott's guilt was substantial, the court rejected all of Lott's challenges to his conviction. The court then independently reviewed the death sentence, and concluded, beyond a reasonable doubt, that the aggravating circumstance that the murder was committed during an aggravated robbery and aggravated burglary

outweighed any mitigating factors. App. 191a. Lott's petition for delayed reconsideration of his direct appeal, and first state post-conviction review petition, were denied. See *State v. Lott*, 1994 Ohio App. Lexis 4965 (Ohio. Ct. App. Nov. 3, 1994) (affirming denial of post-conviction review), appeal denied, 638 N.E.2d 1039 (Ohio 1994).

In 1991, while Lott's first state post-conviction petition was pending, his lawyer obtained police reports that included McGrath's descriptions of his assailant and indicated that police had found an oil lamp in McGrath's house. (Lott now contends that that information was not provided to his trial counsel during Lott's trial.) Lott's post-conviction counsel deliberately kept that information from the court in the post-conviction proceedings, allegedly because two "nationally recognized capital defense attorneys" gave him "general tactical advice" that it was "best to plead claims in state court in very general terms, not fact-intensive terms." See Lott Second Habeas Pet., Ex. E (Myers Aff. ¶ 6).

Lott then filed a federal habeas corpus petition in 1997, including a claim for failure to provide exculpatory evidence before Lott's trial. Lott cited, among other things, the failure to provide a police document containing the victim's description of his attacker, which document Lott's previous post-conviction counsel located in 1991. The district court rejected Lott's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), as procedurally defaulted, found that Lott could not demonstrate cause and prejudice for the default, and concluded that Lott's new evidence would not have affected the trial outcome in any event. *Lott v. Coyle*, No. 1:95-CV-2642 (N.D. Ohio, Op. and Order Mar. 31, 1999) at 56–61.

The Sixth Circuit affirmed the district court's order rejecting Lott's first federal habeas petition, concluding that Lott's *Brady* claim (based on the victim's identification and the oil lamp found in the victim's house) was procedurally

defaulted, and that Lott had not shown cause and prejudice for his default. In so holding, the Sixth Circuit opined:

> The vast majority of Lott's claims in the instant case are procedurally defaulted, and Lott has failed to establish cause and prejudice for default of those claims. He, then, is left to argue that our refusal to evaluate his procedurally defaulted claims would result in a manifest miscarriage of justice because he is actually innocent of the crimes of which he was convicted. See *Schlup v. Delo*, 513 U.S. 298, 314–15 . . . (1995). We are not persuaded that Lott has presented "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial," *id.* at 316, and thus cannot conclude that a manifest miscarriage of justice would result if we declined to review his procedurally defaulted claims.

App. 122a.

In the course of its discussion of Lott's actual innocence argument in his first habeas petition, the Sixth Circuit also addressed, in dicta, the possible effect of Lott's confession:

> Although the [trial] panel did not consider Lott's statement in convicting him, a habeas court may take it into account in evaluating his claim of miscarriage of justice due to actual innocence. (citations omitted) . . . A more detailed review of the circumstances than appears in this record may show that Lott's inculpatory statement, although suppressed at trial, was voluntarily made and admits of no reason to doubt its reliability or truthfulness. Though Lott said he did not recall setting the fire that burned McGrath, the State introduced evidence of Lott's fingerprints in the victim's home, his possession of the victim's car,

> and a shoeprint in McGrath's bedroom that generally matched Lott's shoes. Since this issue may now be pending in state court and has not been fully briefed before us, we reach no final conclusion regarding the effect of the confession.

See *id.* at 161a–62a.

While Lott's appeal of his first federal habeas was pending, Lott filed a second state post-conviction petition in 2000, again arguing that the prosecutor wrongly withheld exculpatory information at trial, namely, the victim's description of his attacker and the police report showing that an oil lamp was found in the victim's house. The trial court rejected those claims. Lott also argued on appeal that he was actually innocent. In 2002, after the Sixth Circuit had rejected Lott's first federal habeas case, the Ohio Court of Appeals rejected Lott's *Brady* and actual innocence claims, both on procedural grounds (failure to meet Ohio statutory standard for successive state post-conviction review petition, and res judicata), and on the merits. See *id.* at 96a–113a. The Ohio Supreme Court declined jurisdiction of Lott's appeal from the denial of his second state post-conviction review petition. *State v. Lott*, 773 N.E.2d 552 (Ohio 2002). In 2002, Lott also filed a motion in the Ohio Supreme Court to vacate his death sentence, based on *Atkins v. Virginia*, 536 U.S. 304 (2002), but the state courts concluded that Lott was not mentally retarded, so denied relief. See *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002); *State v. Lott*, Nos. CR-211002, CR-211261, CR-212720 (Ohio C.P. Ct. Findings of Fact and Conclusions of Law, Oct. 14, 2003).

D. Lott filed a second federal habeas petition.

Two weeks before his scheduled execution date in 2004, Lott applied to the Sixth Circuit for a stay of execution and for permission to file a second federal habeas petition to raise an actual innocence claim based on the claimed *Brady* violation. The Sixth Circuit concluded that the federal courts

could hear his *Brady* claim even though the Sixth Circuit had previously rejected it as procedurally barred, because the Ohio Court of Appeals had discussed Lott's *Brady* claim on the merits in its opinion denying Lott's second post-conviction relief petition. See App. 84a–86a. The Sixth Circuit authorized Lott to file his second petition, and stayed Lott's execution indefinitely. See App. 88a. Chief Judge Boggs dissented from the order granting Lott permission to file a second petition, given the Sixth Circuit's ruling rejecting his claims in his first petition, and Lott's admitted knowledge of the factual predicate for his claims well before he filed his first petition. App. 89a–91a; see also 28 U.S.C. § 2244(b)(2)(B)(i). Orders authorizing the filing of second habeas petitions are not appealable. See *id.* § 2244(b)(3)(E).

Lott's second federal habeas petition contains one ground for relief, "Gregory Lott is entitled to habeas relief because he is innocent." Lott's Second Habeas Pet., Br. at 1. Lott, in his second habeas petition, now *denied* that he had ever confessed his role in the crime to the police. *Id.* at 14. Lott contended that the only evidence that should be considered regarding his actual innocence claim is that which he asserts was wrongfully withheld under *Brady*, and not his confession to police, despite the Sixth Circuit's statement, in denying Lott's first habeas appeal, that Lott's confession should be considered in regard to any actual innocence claim. *Id.*; cf. App. 161a–62a.

E. The district court granted in part the Warden's counsel's discovery request seeking information with which to defend against Lott's actual innocence claim.

To defend against Lott's actual innocence claim, the Warden sought discovery from Lott. Specifically, the Warden asked to depose Lott and his trial counsel regarding whether Lott had ever admitted to his trial counsel that he had committed the murder or that Lott had confessed his

involvement in the crime to Detective Hughey. The Warden also sought to learn from Lott's trial counsel whether (and when) they were aware of the victim's identification information that the prosecutor allegedly failed to provide at trial. Warden's Motion for Discovery, at 3. The Warden also sought information from Lott's former post-conviction counsel to establish why Lott did not raise the *Brady* claims based on the victim's identification, and based on the oil lamp found in the victim's house, in Lott's first state post-conviction or initially in the first federal habeas petition. *Id.*

The district court granted the Warden's discovery request in part, and denied it in part. The district court granted the Warden's request to depose Lott's trial counsel regarding his knowledge, during the original trial, of the identification information and the information about the oil lamp in McGrath's house, and regarding any admission by Lott about his confession to police or Lott's role in the murder. The district court held that by asserting his "actual innocence" claim—which requires an evaluation of "all of the evidence" relevant to his guilt—Lott had impliedly waived his attorney-client and work-product privileges as to information regarding that innocence. App. 38a–45a. The district court also granted in part the Warden's discovery request seeking Lott's former trial counsel's notes, but required that those documents be submitted to the trial court for *in camera* review to determine which of those materials should be provided to the Warden. *Id.* at 57a–58a. The trial court denied the request to depose former post-conviction counsel, except to find out the date on which they found out about the police reports containing the victim's description of his assailant, and why that information was not included in Lott's first post-conviction petition. *Id.* at 54a–57a.

Lott sought certification of an immediate interlocutory appeal of the district court's order under 28 U.S.C. § 1292, but the district court denied certification. App. 3a.

F. The Sixth Circuit stayed discovery, and it granted a writ of mandamus against the district court with regard to the trial court's finding of an implied waiver of attorney-client and work-product privileges.

Lott filed a mandamus petition against the district court's discovery order. The Sixth Circuit stayed that order pending its consideration of the merits. App. 67a. The Sixth Circuit then granted a writ of mandamus against the district court, concluding that the lower court had committed "clear error" by ruling that Lott had impliedly waived the attorney-client privilege, and holding that the harm to Lott, and to the privilege, from disclosure warranted mandamus relief. *Id.* at 1a–18a. (That ruling is limited to the district court's finding of implied waiver of the attorney-client and work-product privileges. *Id.* at 3a n.1.)

The Sixth Circuit panel majority rejected the argument that *Schlup*'s "all the evidence" mandate for actual innocence claims meant that Lott had impliedly waived the privilege based on *Schlup v. Delo*. The Sixth Circuit acknowledged that any statements Lott made to his attorney about his guilt or innocence would be "unquestionably relevant to the determination of whether or not he is innocent." *Id.* at 16a. The majority nevertheless concluded that *Schlup*'s "all the evidence" mandate ordered courts to set aside only the usual admissibility rules, not the privilege rules. *Id.* The Sixth Circuit majority remanded the case to the district court with directions to vacate the discovery order to the extent it was inconsistent with the appellate court's opinion. *Id.*

Chief Judge Boggs dissented. *Id.* at 19a. He asserted that Lott could not maintain the privilege while asserting his actual innocence claim. *Id.* Chief Judge Boggs observed that Lott's actual innocence claim is one of "'factual innocence, not mere legal insufficiency,'" citing *Bousley v. United States*, 523 U.S. 614, 623 (1998), which requires the district

court to determine "if in fact Lott committed the murder." App. 21a. Chief Judge Boggs further stated that the Court has commanded that such claims must be evaluated "in light of all the evidence," including evidence that was either excluded or unavailable at trial, and evidence alleged to be illegally admitted at trial. *Id.* at 22a. The dissenting judge thus concluded that an implied waiver of the attorney-client privilege was essential to achieving a just resolution of Lott's actual innocence claim. *Id.*

Chief Judge Boggs also noted that recognition of implied waiver in this unique context does no violence to the privilege in other areas of law. In his view, "[i]t frankly blinks at reality to believe that a criminal defendant will be less candid with his attorney because of his possible assertion of a claim that would likely only be raised after conviction, a full course of appeals in the state courts, post-conviction review in the state courts, and federal habeas review . . .[so] [t]he purposes of the privilege are not harmed by [a] ruling [impliedly waiving the privilege in this context]." *Id.* at 28a. Finally, Chief Judge Boggs observed that mandamus relief was unwarranted here, as any error in the district court's order could be readily corrected on appeal, by ruling the privileged matter inadmissible in Lott's case. *Id.* at 29a–33a.

For the reasons discussed below, the Warden now respectfully requests certiorari review of the Sixth Circuit's mandamus order.

REASONS FOR GRANTING THE PETITION

The decision below allows actual innocence claimants to hide what may be the most relevant evidence regarding those claims, in conflict with *Schlup*'s mandate to weigh "actual innocence" claims "in light of all the evidence."

Review is needed regarding whether a habeas petitioner who claims "actual innocence" under this Court's precedents impliedly waives the attorney-client and work-product privileges regarding information that bears upon the issues raised in the "innocence" claim. While the circuits other than the Sixth have not yet addressed this issue, it nevertheless merits review now.

The Sixth Circuit's ruling effectively allows habeas petitioners who assert "actual innocence" claims to hide the evidence most relevant and crucial to proving—or disproving—their claims. In *Schlup v. Delo*, 513 U.S. 298 (1995), the Court directed habeas courts to consider "actual innocence" claims "in light of all the evidence," including that which is alleged to have been illegally obtained, with due regard to that evidence's reliability, *id.* at 328. In defending against such a claim, States must be permitted to test the reliability of the prisoner's newly-presented evidence and contentions by inquiring about documents or statements that support (or refute) them, including those of the prisoner and his former counsel. While the district court's discovery order permitted just that, the Sixth Circuit majority vacated the privilege-related aspects of that order through a writ of mandamus. The court held that the district court clearly erred in concluding that Lott's actual innocence claim impliedly waived the privilege as to the issues Lott raised in his claim. The Sixth Circuit's rule is at odds with this Court's mandate in *Schlup* to consider all the evidence regarding innocence. And the ruling below creates significant problems for States defending against such claims, which often are late-in-the-

game, last-ditch efforts to evade a state-court conviction and sentence.

1. The decision below effectively changes the rules of federal habeas review in a way that could lead to a significant increase in actual innocence claims. Cf. *Schlup*, 513 U.S. at 321 (actual innocence claims are to be "rare" and reserved for the "truly deserving"). Habeas petitioners are more likely to assert actual innocence claims as a routine litigation tactic if they know that they can do so while withholding relevant, but privileged, information from the State in pressing that claim. That result threatens to undermine the finality of State court convictions.

As the Court has often recognized, States have an important interest in the finality of their convictions and the integrity of their processes for review and challenge of those convictions. Finality of state court convictions serves the important State interest of deterring crime, "since the deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks." *Kuhlmann v. Wilson*, 477 U.S. 436, 452–53 (1986). Federal court decisions like the one below upset the comity between the federal and state systems by adding yet another layer of federal review, and potential second-guessing, of state court convictions.

2. The Sixth Circuit's ruling also is at odds with this Court's direction in *Schlup* that a court evaluating an actual innocence claim must consider the claim "in light of all the evidence" relevant to a prisoner's guilt or innocence, not just the evidence at trial. 513 U.S. at 327–28. Review of all the innocence-related evidence means that States may test the reliability of late-in-the-day assertions by habeas petitioners claiming actual innocence. An implied waiver of the claimant's attorney-client and work-product privileges by a habeas petitioner under these circumstances is required by

Schlup, as the dissent below concluded, App. 22a–23a, or waiver follows naturally from *Schlup*'s mandate to consider all the innocence-related evidence, regardless of the usual rules governing admissibility, 513 U.S. at 327–28, and this Court should say so.

Schlup v. Delo held that to avoid a procedural bar to consideration of the merits of a constitutional claim, a habeas petitioner may assert that he is "actually innocent" of the crime, and thus that his continued incarceration is a fundamental miscarriage of justice. 513 U.S. at 321 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986) and *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986)). The Court in *Schlup* recognized that the "actual innocence" exception was reserved for the "extraordinary" case, 513 U.S. at 321, and requires the habeas petitioner to show that it is "more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327.[1]

In *Herrera v. Collins*, 506 U.S. 390 (1993), the petitioner asserted a "free-standing" actual innocence claim based on newly discovered evidence (i.e., a claim that execution of one who was actually innocent is unconstitutional even when that person has had a fair trial, rather than asserting actual innocence as a "gateway" to an otherwise-defaulted constitutional claim). The Court rejected Herrera's claim. The Court stated that even assuming that a free-standing actual innocence claim existed, the burden of

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[1] Claims asserted in a second habeas petition must now meet the standards of the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2244(b). To permit filing of a second petition containing claims not presented in a prior petition, AEDPA requires, in addition to "due diligence" in discovering the basis of the claim, proof by clear and convincing evidence that no reasonable factfinder would have convicted the prisoner. See 28 U.S.C. § 2244(b)(2)(B)(i)–(ii); but cf. *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (not reaching issue of whether § 2244(b) replaced *Schlup*, as petitioner was entitled to relief under either standard).

proof of actual innocence "would necessarily be extraordinarily high," 506 U.S. at 417, and Herrera had fallen far short of meeting it. Compare *id.* at 404 ("[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."), with *id.* at 417 ("We may assume, for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim . . . [but] the threshold showing for such an assumed right would necessarily be extraordinarily high."). Thus, even *if* such a free-standing claim exists, which Ohio disputes, cf. 506 U.S. at 404, the necessary showing would be even higher than that required for a gateway claim under *Schlup*.

The high standard for proving an actual innocence claim is not surprising, as such claims provide an "extraordinary" means to overcome a final criminal conviction. *Schlup*, 513 U.S. at 321. Consequently, unlike the presumption of innocence that a criminal defendant enjoys before trial, Lott comes before the habeas court with at least a "strong," if not "conclusive," presumption of guilt. *Id.* at 326 n.42.

To meet this high standard, the Court in *Schlup* put aside usual evidence rules, such as the exclusionary rule. Consistent with that admonition, the actual-innocence claimant's attorney-client and work-product privileges also must yield to the extent that the privileged matters relate to the contentions in the actual innocence claim. Habeas petitioners generally retain attorney-client or work-product privileges in habeas litigation. See Fed. R. Evid. 1101(c). But Lott here asserted an "actual innocence" claim, invoking *Schlup*, and citing *Herrera*, thus subjecting his claims to the searching factual review and high standard of proof that a

showing of "factual innocence" requires. Cf. Lott's Traverse at 18 (citing *Schlup*), 40–41 (citing *Herrera*).[2]

However an "actual innocence" claim is cast,[3] the relevant inquiry for a habeas court evaluating actual innocence is one of "*factual* innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623–24 (emphasis added). "To be credible, such a claim requires [a] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*,

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[2] Lott slaloms between *Schlup* and *Herrera* in characterizing the basis of his claim. Lott's Traverse at 41 ("Lott's actual innocence claim is not 'free standing' because it is tethered in part to a *Brady* violation . . . But [Lott's reliance in part on police documents] neither defines his claim as a *Brady* claim, nor fairly corrals his current claim into one that merely uses actual innocence as a gateway to gain a merits review of a free-standing *Brady* claim.") Later, he characterizes his claim as a "hybrid" actual innocence claim, urging that the question to be decided is "whether, in light of the evidence of innocence, would any reasonable fact-finder find [Lott] guilty," and suggesting that that question is different than whether he has proven that he is in fact innocent. Lott's Sur-Reply to Petitioner's Traverse, at 1–2. Not only is Lott wrong when he contends that some sort of "hybrid" *Schlup-Herrera* claim exists, the Court's cases on actual innocence require that "all the evidence" be considered, not just evidence of innocence. Cf. *Schlup*, 513 U.S. at 328.

As Chief Judge Boggs noted in his dissent to the Sixth Circuit's order allowing Lott to file a second habeas petition, the Sixth Circuit either had already addressed Lott's actual innocence claim based on withheld exculpatory evidence, in denying Lott's first habeas petition, *or* Lott's claim in his second petition failed to meet the standard in 28 U.S.C. § 2244(b)(2)(B) for a second petition. See App. 88a–94a. And as noted above, Ohio disagrees that a free-standing actual innocence claim under *Herrera*, above, or a "hybrid" *Schlup-Herrera* claim (as Lott describes it), exists. However, given the Sixth Circuit's order allowing Lott to file his second petition, Ohio must defend that against Lott's contentions regarding his "actual innocence" claim. Ohio sought the discovery below for that purpose.

[3] As noted above, Ohio disputes that a free-standing innocence claim, or a hybrid *Schlup-Herrera* actual innocence claim, exists. See above, at n. 2.

513 U.S. at 324. An actual innocence claim calls for review of "all the evidence," not just the evidence that a habeas petitioner puts forward to cast doubt on his guilt. "The habeas court must make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" *Schlup*, 513 U.S. at 328 (citing Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)). It is not enough for a habeas petitioner to dismiss inculpatory evidence as having been obtained illegally. Under *Schlup*, that evidence, with due regard for its reliability, or lack of it, must be considered. See *Kuhlmann*, 477 U.S. at 454 n.17 ("Thus, the question whether the habeas petitioner can make the requisite showing must be determined by reference to *all* probative evidence of guilt or innocence.") (emphasis in original).

After all, it would make no sense to allow habeas courts to revisit final state-court convictions based solely on the habeas petitioner's "best" evidence of his innocence. Instead, all of the relevant evidence must be considered—the petitioner's new evidence, the evidence at trial, and other evidence not admitted (or available) at trial that sheds light on the reliability of the habeas petitioner's new evidence and contentions. Where the State has obtained a final judgment of conviction and the habeas petitioner comes before the district court with a strong, if not conclusive, presumption of guilt, *Schlup*, 513 U.S. at 326 n.42, an inquiry into whether the habeas petitioner is nevertheless "factually innocent" requires no less than a full examination of *all* of the evidence relevant to the petitioner's guilt or innocence.

As the dissent below noted, "[w]hen both the court and the parties step 'through the looking glass' to consider a petitioner's actual innocence, they engage in an inquiry of a

fundamentally different kind . . . [and a] claim of actual innocence thus places unique demands on the attorney-client privilege, based on values that do not transfer to other areas of law." App. 27a. Thus, in this scenario, not only are the usual rules of admissibility put aside, but the claimant's privilege must yield as well, to the extent that otherwise privileged matters relate directly to contentions made to support the actual innocence claim.

An implied waiver of attorney-client and work-product privileges regarding matters related to an actual innocence claim comports with Rule 501 of the Federal Rules of Evidence, which authorizes federal courts to determine the scope of privilege "in the light of reason and experience."[1] The attorney-client privilege was designed to foster full and frank conversations between clients and their attorneys. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (describing purposes served by attorney-client privilege). An implied waiver of the privilege does not undermine the values that the privilege was designed to protect. As the dissent below noted, "[i]t frankly blinks at reality to believe that a criminal defendant will be less candid with his attorney because of his possible assertion of a claim that would likely only be raised after a conviction, a full course of appeals in the state courts, post-conviction review in the state courts, and federal habeas review." App. 28a. Implying waiver of the privilege under these circumstances does not interfere with the fundamental purposes served by the privilege.

The Court has long recognized that evidentiary privileges, even existing ones, are not to be expansively construed, "for they are in derogation of the search for the

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[1] An actual innocence claim is a federal-law claim brought in federal court, so the federal law of privilege applies. See Fed. R. Evid. 501. Thus, issues of implied waiver of privilege here are also determined by federal law. See, e.g., *Bittaker v. Woodford*, 331 F.3d 715, 726 (9th Cir. 2003) (when the court imposing an implied waiver of privilege is a federal court, the scope of waiver is a matter of federal law).

truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974); see also *United States v. Zolin*, 491 U.S. 554, 568–70 (1989) (permitting *in camera* review of documents alleged to come within the crime-fraud exception to attorney-client privilege); *United States v. Nobles*, 422 U.S. 225, 239–40 (1975) (finding waiver of work-product privilege regarding matters in investigator's testimony). It would be odd indeed if a privilege that undeniably impedes the search for the truth could be used as a roadblock to considering "all the evidence" relevant to a *Schlup* actual innocence claim—a claim that is "extraordinary" in federal habeas and in which previous limitations on evidence do not apply.

Additionally, the ruling below is at odds with the view that evidence obtained in violation of constitutionally-based trial protections may be considered in determining an actual innocence claim. See App. 25a–26a (Boggs, C.J., dissenting). The *Schlup* Court's approval of Judge Friendly's article concerning habeas relief based on claims of actual innocence shows that evidence seized in violation of the Fourth Amendment can and should be reviewed to determine actual innocence. See 513 U.S. at 328 n.46. A court has ruled that the self-incrimination privilege under the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966), also gives way in the unique context of an actual innocence claim. See, e.g., *Bean v. Calderon*, 166 F.R.D. 452 (E.D. Cal. 1996) (allowing habeas petitioner asserting actual innocence claim to invoke Fifth Amendment privilege at his deposition, but stating that court would draw adverse inference from his having done so). Similarly, courts assessing a petitioner's actual innocence have considered questionable hearsay evidence—evidence that in other contexts presents Sixth Amendment Confrontation Clause problems. See, e.g., *Doe v. Menefee*, 391 F.3d 147, 162, 170 n.20 (2d Cir. 2004) (considering hearsay testimony to assess innocence claim under *Schlup*'s "all the evidence" mandate); cf. *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004). And here, the Sixth Circuit (in its

earlier opinion in this case) correctly opined that Lott's confession, which was suppressed at trial on Sixth Amendment grounds, was relevant to his actual innocence claim and must be considered in assessing that claim. App. 161a. The order below, by categorically denying an implied waiver of attorney-client and work-product privileges, is inconsistent with the understanding that evidence obtained in contravention of constitutionally-based trial protections such as Sixth Amendment and Fourth Amendment, should be considered in determining "actual innocence." That inconsistency is particularly apparent when one considers that courts have not fashioned a doctrine of "implied waiver" of constitutional rights, but often apply implied waiver to claims of privilege. Cf. *id.* at 26a (Boggs, C.J., dissenting).

3. The court's refusal to recognize implied waiver below also conflicts with implied waiver case law more generally. See, e.g., *United States v. Amlani*, 169 F.3d 1189, 1195–96 (9th Cir. 1999) (criminal defendant impliedly waived attorney-client privilege by claiming prosecutor disparaged his attorney, causing defendant to fire him and thereby interfering with defendant's right to counsel; information pertaining to defendant's substitution of counsel was vital to government's argument that its actions did not cause defendant to seek new counsel); *Minebea Co. v. Papst*, 355 F. Supp. 2d 518, 524–25 (D.D.C. 2005) (finding implied waiver based on party's assertion of justifiable reliance on opponent's misrepresentations); *United States v. Exxon Corp.*, 94 F.R.D. 246, 247–48 (D.D.C. 1981) (affirmative defense of good faith reliance on government regulations impliedly waived privilege regarding company's subjective intent in deciding how to comply with regulations).

Indeed, courts routinely find an implied waiver of the attorney-client and work-product privileges when a habeas petitioner contests his conviction on the ground that his counsel was ineffective at trial. See, e.g., *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) ("It has long

been the rule in the federal courts that, when a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer."). While Lott insists that his claim here is not one of ineffective assistance of counsel, Lott's actual innocence claim affirmatively raised issues regarding the reliability of his confession and when his counsel learned of allegedly exculpatory information. Cf. Lott's Sur-Reply to Petitioner's Traverse at 1 ("Lott is not raising a claim of ineffective assistance of counsel.").

Here, Lott's verified habeas petition directly placed at issue his confession to police and his trial counsel's knowledge of exculpatory evidence. Lott's petition asserts his actual innocence, denies that he ever confessed to the police, and states that his trial counsel was unaware of the victim's identification of his assailant or the oil lamp found in the victim's home. See Lott's Second Habeas Pet., Br. at 1, 5, 7, 14–15. *Schlup* requires that actual innocence claims be evaluated "in light of all the evidence." 513 U.S. at 328. Accordingly, the district court properly concluded that Lott had impliedly waived the attorney-client and work-product privileges regarding those matters, and the Sixth Circuit's decision to the contrary muddies the implied waiver case law.

First, Lott has impliedly waived the privilege regarding his former post-conviction counsel's decision not to raise the *Brady* claims Lott presses now. Section 2244(b)(2)(B) requires him to show his "due diligence" in discovering the basis for his claim in a successive habeas petition.[5] Even though "ineffective assistance" of post-conviction counsel is

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[5] As noted above, the Warden has argued that Lott's actual innocence arguments regarding his *Brady* claim were addressed by the Sixth Circuit when that court denied Lott's first habeas petition, so under 28 U.S.C. § 2244(b)(1), Lott's second petition is not properly before the federal courts at all. See note 2, above. But the Warden must fully defend against Lott's second petition now that the Sixth Circuit authorized its filing.

not a cognizable habeas claim, see 28 U.S.C. § 2254(i), to be able to file a second petition at all, Lott must rely on his former post-conviction counsel's excuse for failing to raise these claims earlier.

Second, Lott has waived the privilege regarding his trial counsel's knowledge, or lack of knowledge, of exculpatory material Lott now invokes to support his claim. Surely the State is not required to accept at face value Lott's trial counsel's (Kersey's) affidavit asserting that the prosecutor did not tell Lott's counsel about this evidence during the trial. Cf. Lott's Second Motion for Rule 7 Record Expansion, Ex. L (Kersey Aff.). Indeed, by proffering an affidavit with his lawyer's testimony, Lott directly waived any attorney-client and work-product privileges, at least regarding the matters addressed in the affidavit. See *Hunt v. Blackburn* 128 U.S 464, 470–71 (1888); *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 615 (2d Cir. 1964) ("[T]he Cook affidavit purports to be based upon information received by Cook as Attorney for [the defendant] and in many respects parallels the allegations made in the answer and counterclaims. The district court properly held that under these circumstances the affidavit constituted a waiver by [the defendant] of the attorney-client privilege.") Additionally, Lott's trial counsel's notes are material to Lott's claim that his lawyers were not aware of this evidence at trial. Because all of these materials were directly put at issue by Lott's claims here, and are vital to the State's defense, Lott has waived any attorney-client and work-product privileges as to any notes and attorney-client communications relating to those matters, just as surely as if he had urged an "ineffective assistance of counsel" claim. Cf. *Bittaker*, 331 F.3d at 716 (federal courts recognize an implied waiver of the privilege when habeas petitioner raises an ineffective assistance of counsel claim); *Tennison v. City and County of San Francisco*, 226 F.R.D. 615, 622–23 (N.D. Cal. 2005) (civil rights plaintiff, whose case was based on contention that government withheld

exculpatory information that would have led to his acquittal, impliedly waived attorney-client and work-product privileges as to any exculpatory evidence that plaintiff or his attorney may have known about).

Finally, by raising his actual innocence claim and denying that he ever confessed, Lott also has placed at issue whether or not he confessed to his role in the murder. An implied waiver of privilege regarding attorney-client communications or work-product relating to this issue is warranted under this case law, especially given its centrality to the *Schlup*-mandated review of "all the evidence" related to his "factual" innocence. Cf. *Schlup*, 513 U.S. at 328.

4. The ruling below presents States defending against actual innocence claims with a difficult problem. Such claims often are brought many years after the conviction, when witness recollections may have dimmed. Cf. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("When a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication.") (quotation marks omitted). For example, defending against an "innocence" claim regarding a long-ago crime may involve problems of weighing "cold" evidence against the claimant's "new" evidence. Cf. *Herrera*, 506 U.S. at 403–04.

This case presents a prime example of the difficulties States face in defending against these claims. Lott was convicted of capital murder and sentenced to death in 1987. In his second federal habeas petition in 2004, Lott denied that he ever confessed his role in the crime to a police officer in 1986. While Lott's confession was not used to convict him at trial, it is relevant and must be considered in regard to his "factual innocence" claim, as the Sixth Circuit recognized in its opinion denying Lott's first federal habeas petition. See App. 161a. But the Sixth Circuit's ruling categorically

rejecting an implied waiver of the privilege impedes the State in defending against Lott's present assertion that the confession was totally fabricated. Cf. Lott's Second Habeas Pet., Br at 14–15. The troubling prospect of a federal court determining that a habeas petitioner is "actually innocent" without having had the benefit of additional evidence, not admitted at trial, that nevertheless may confirm the petitioner's guilt, threatens the finality of state-court convictions and comity between the federal and state judicial systems.

* * *

A habeas petitioner asserting his "actual innocence" must prove his factual innocence in light of all the evidence. That claim, to the extent it even exists in the context in which Lott asserts it here, is an extraordinary one in which the habeas petitioner seeks to overturn an otherwise final state conviction on the basis that it is a "fundamental miscarriage of justice." Cf. *Schlup*, 513 U.S. at 324–25. That inquiry is unlike other legal proceedings, and "previous limitations on evidence do not apply." App. 22a (Boggs, C.J., dissenting). Fairness requires that the claimant's privilege must yield to the extent that the communications or work product materials are directly relevant to the petitioner's specific contentions in support of his actual innocence claim. The implied waiver issue presented here merits review now, even before other courts of appeals grapple with implied waiver of privileges in the "actual innocence" context, as the ruling below may well encourage actual innocence claims as a routine litigation tactic rather than a "rare" claim reserved for the "truly deserving." Cf. *Schlup*, 513 U.S. at 321.

An actual innocence claim "attempts to strike a balance between the interests in finality and comity, on the one hand, and individualized justice on the other." App. 29a (Boggs, C.J., dissenting). The Sixth Circuit's decision effectively

allows the privilege "to oppose finality and comity by prolonging the fair disposition of such claims and encouraging their proliferation." *Id.*

For all of these reasons, Ohio urges this Court to review this case, and to reverse the Sixth Circuit's decision below.

CONCLUSION

For all of the above reasons, Ohio urges the Court to grant Ohio's petition and reverse and vacate the Sixth Circuit's decision issuing a writ of mandamus against the district court's discovery order.

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January 27, 2006

Supreme Court, U.S.
FILED
05-962 JAN 27 2006
OFFICE OF THE CLERK

In the Supreme Court of the United States

MARC HOUK, Warden,

Petitioner,

v.

GREGORY LOTT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

In re: GREGORY LOTT, Petitioner.

No. 05-3532

424 F.3d 446

United States Court of Appeals
for the Sixth Circuit

May 10, 2005, Submitted
September 9, 2005, Decided
September 9, 2005, Filed

Before: Boggs, Chief Judge; Merritt and Cole, Circuit Judges. Merritt, J., delivered the opinion of the court, in which Cole, J., joined. Boggs, C. J., delivered a separate dissenting opinion.

Merritt, Circuit Judge. Gregory Lott has petitioned this Court for mandamus relief from a discovery order in which the District Court "waived" his attorney-client privilege because he claims actual innocence. There is no case authority holding that a claim of actual innocence "waives" the attorney-client privilege or similar privileges such as the doctor-patient and priest-penitent privilege.

Lott was convicted and sentenced to death for the 1986 murder of John McGrath, an elderly resident of East Cleveland, Ohio. Lott is currently in the midst of litigating his second habeas corpus proceeding pursuant to this Court's authorization. *See In re Lott*, 366 F.3d 431, 434 (6th Cir. 2004). In this petition, Lott contends that the prosecutor in his original trial withheld vital exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). As set forth in our order

authorizing Lott's second petition, *Lott* has made a prima facie showing that the prosecutor in his original trial both withheld important evidence from the court and made statements to the court that were directly contradicted by the evidence withheld from the defendant. *Lott*, 366 F.3d at 433.

In order for Lott to succeed in this second application for habeas relief, he must establish that but for the constitutional errors during his trial, no reasonable factfinder would have found him guilty of the murder. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). Lott maintains that he is, in fact, innocent of the murder. To counter this claim of innocence, the warden seeks discovery of any evidence that might demonstrate Lott's guilt, including evidence of an alleged confession that was suppressed during the original criminal trial due to a Miranda violation.

The District Court ruled that through his assertion of actual innocence, Lott has "implicitly waived the attorney-client and work product privileges to the extent necessary for the Respondent to defend the actual innocence claim." *Lott v. Bradshaw*, 2005 U.S. Dist. Lexis 21227, No. 1:04-CV-822 (N.D. Ohio Mar. 29, 2005) (Order granting in part and denying in part Respondent's Motion for Discovery at 9-11). In accordance with this ruling, the District Court authorized the warden to depose and seek production of documents from Lott's trial counsel. Specifically, the Court ruled that Lott's trial counsel must provide any relevant information he has concerning whether Lott is guilty of the murder and whether Lott confessed the murder to the police.

On May 9, 2005, Lott filed a petition for mandamus with this Court and a motion to stay discovery pending the Court's consideration of his mandamus petition. This Court stayed the discovery proceedings on June 22, 2005. Having now received further briefings from the parties, a response by the District Court Judge, as well as numerous amicus briefs from

interested parties, and a response to the briefs from the State, we now turn to the merits of Lott's mandamus petition. The District Court's order constitutes a departure from existing law for which we find no precedent. It undermines the historically strong protections of the attorney-client privilege. n1 As the order places the privileged relationship between a client and his attorney in jeopardy, this Court will issue the writ.

n1 While our decision is couched in terms of the attorney-client privilege, it applies with equal force to the work product privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 400, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981); *Bittaker v. Woodford*, 331 F.3d 715, 722 n.6 (9th Cir. 2003).

I. Jurisdiction

Discovery orders are generally not considered final for purposes of 28 U.S.C. § 1291. Typically, review of such orders becomes available only when there is a final judgment in the case. Assuming that this court does not have jurisdiction to review the District Court's order under § 1291, we must determine if there is some other jurisdictional basis for us to conduct immediate review of the order. n2 Pursuant to 28 U.S.C. § 1292(b), a district judge may certify an order not otherwise appealable for interlocutory appeal when that order "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation." Such interlocutory appeal, however, is unavailable in this case because the District Court refused to certify the issue for appeal. *Lott v. Bradshaw*, No. 1:04-CV-822 (N.D. Ohio Apr. 28, 2005) (Denial of Petitioner Lott's motion to certify for appeal the order granting respondent discovery). When there is extraordinary need for review of an order before final

judgment and the District Court has refused to certify the issue pursuant to § 1292(b), this Court has authority to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651. The All Writs Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651.

n2 It should be noted that some courts of appeals have found that orders compelling discovery over a claim of privilege are immediately appealable under the collateral order doctrine. *United States v. Philip Morris*, 354 U.S. App. D.C. 171, 314 F.3d 612, 617 (D.C. Cir. 2003); *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997). This doctrine permits an appeal to lie if (1) the order from which the appellant appeals conclusively determines the disputed question; (2) the order resolves an important issue that is completely separate from the merits of the dispute; and (3) the order is effectively unreviewable on appeal from a final judgment. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949). While discovery orders such as the one at issue will satisfy most of the Cohen elements, there is some question as to whether the "importance" element of the second prong will be met in every appeal of a privilege issue. *See Johnson v. Jones*, 515 U.S. 304, 315, 132 L. Ed. 2d 238, 115 S. Ct. 2151 ("We of course decide appealability for categories of orders rather than individual orders. Thus, we do not now in each individual case engage in ad hoc balancing to decide the issues of appealability"). There is some question as to whether each and every privilege ruling by a district court necessitates appellate review. This is an area of the law where the use of discretion inherent in our mandamus jurisdiction is more appropriate. As the criteria for mandamus relief are clearly met and

> our jurisdiction under § 1651 is proper, we see no need to rule on whether or not the District Court's order is collateral.

Our Court has continually recognized that mandamus relief is an "extraordinary remedy" that should be utilized only infrequently. This extraordinary remedy is usually reserved for "questions of unusual importance necessary to the economical and efficient administration of justice," or "important issues of first impression." *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1061 (6th Cir. 1982). We have "embraced a multi-factor test for determining the propriety of mandamus." *In re Chimenti*, 79 F.3d 534, 539 (6th Cir. 1996) (citing *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 304 (6th Cir. 1984)). When making such a determination, this Court will consider whether the following factors are met:

(1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired

(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.

(3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.

Bendectin, 749 F.2d at 304. We have never required that every element be met in order for mandamus to issue: "'Rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is

relevant or applicable." *Id.* (quoting *Bauman v. United States District Court*, 557 F.2d 650, 655 (9th Cir. 1977)). As such, the mandamus analysis "cannot be wholly reduced to formula." *Chimenti*, 79 F.3d at 539.

In this case, the first, second, third, and fifth factors all weigh heavily in favor of issuing mandamus. With regard to the first factor, our initial jurisdictional considerations make clear that Lott has no other readily-available means of relief from the discovery order. Mandamus must issue or his counsel will be obliged to obey the binding court order and disclose the privileged communications. Review of that decision will only become available after there is a final judgment. As to the fifth factor, whether an assertion of actual innocence effects an implied waiver of the attorney-client and work product privileges is plainly an issue of first impression in this Circuit, and apparently an issue of first impression in the federal courts. The remaining two factors of the mandamus analysis deserve more extensive examination.

The oldest of the privileges, the attorney-client privilege has been recognized since the reign of Queen Elizabeth. *See*, e.g., *Hartford v. Lee*, 21 Eng. Rep. 34 (Ch. 1577). And, as Wigmore notes, the privilege was virtually "unquestioned" even then. 8 J. Wigmore, Evidence § 2290, at 547 (3d ed. 1940). The attorney-client privilege encourages "'full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 141 L. Ed. 2d 379, 118 S. Ct. 2081 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)). As we have previously noted, "the privilege encourages clients to make full disclosure to their lawyers, and "[a] fully informed lawyer can more effectively serve his client." *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998). It is not

hyperbole to suggest that the attorney-client privilege is a necessary foundation for the adversarial system of justice.

If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to delineate the scope of the privilege in ways that are predictable and certain. "An uncertain privilege—or one which purports to be certain, but rests in widely varying applications by the courts—is little better than no privilege." *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) (quoting *In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987)); *Swidler & Berlin*, 524 U.S. at 409 (recognizing the need to avoid "substantial uncertainty into the privilege's application"). When defining the contours of the attorney-client privilege, we are guided by "the principles of the common law . . . as interpreted by the courts . . . in the light of reason and experience." Fed. R. Evid. 501; *Swidler & Berlin*, 524 U.S. at 403.

We find mandamus is appropriate in this case because if the discovery order stands, the petitioner will be damaged in a way that cannot be corrected through the course of ordinary appeal. *Bendectin*, 749 F.2d at 304.

The inability to cure an unlawful piercing of the privilege through direct appeal has led numerous courts of appeals to regularly utilize mandamus when important interests such as privilege are at issue. "Writ review is rather frequently provided . . . because of the desire to protect against discovery of information that is claimed to be protected by the Constitution, privilege, or more general interests in privacy." 16 Charles Alan Wright et al., Federal Practice and Procedure § 3935.3, at 605-06 (2d ed. 1996 & supp. 2005) (emphasis added); *see id.* at n.6 (citing cases where mandamus was issued to review claims of privilege); *Hahnemann University Hospital v. Edgar*, 74 F.3d 456, 461

(3d Cir. 1996); *See also In re Regents of University of California*, 101 F.3d 1386, 1387 (Fed. Cir. 1996), cert. denied 520 U.S. 1193, 137 L. Ed. 2d 695, 117 S. Ct. 1484 (issuing mandamus to set aside discovery order where district court erroneously ordered discovery over claim of attorney-client privilege); *Chase Manhattan Bank, N.A. v. Turner & Newall*, PLC, 964 F.2d 159, 163 (2d Cir. 1992) (similar); *In re Bieter*, 16 F.3d 929, 931-33 (8th Cir. 1994) (similar). This Court has utilized the All Writs Act to alter a discovery order implicating the attorney-client privilege. *In re Perrigo*, 128 F.3d 430, 441 (1997) (altering a discovery order that would have required public disclosure of information protected by the attorney-client privilege).

These Courts have all found that forcing a party to disclose confidential communications and seek redress via direct appeal after the court has reached a final judgment is an inadequate remedy. In *Hahnemann*, the Court of Appeals for the Second Circuit held that the type of relief afforded by direct appeal is usually insufficient when a claim of privilege is made. 74 F.3d at 461 ("when a district court orders production of information over a litigant's claim of a privilege not to disclose, appeal after a final decision is an inadequate remedy . . . for compliance with the production orders complained of destroys the right sought to be protected.") (quoting *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984); *See* also *University of California*, 101 F.3d at 1387 ("an appeal after disclosure of the privileged communication is an inadequate remedy") (citation omitted). As has been noted in footnote 3, some courts have reached a similar conclusion under the collateral order doctrine, which requires a finding that an order be "effectively unreviewable" on appeal. *See*, e.g., *Ford Motor Co.*, 110 F.3d at 963 ("Once putatively protected material is disclosed, the very 'right sought to be protected' has been destroyed) (citation omitted).

It has been argued that mandamus is unnecessary as this Court could remedy any harm on direct appeal. *See In re Lott*, 139 Fed. Appx. 658, 2005 U.S. App. Lexis 12280, 2005 WL 1515367 at *6-*7 (6th Cir. Jun 22, 2005) (Boggs, C.J., dissenting). By this logic, if discovery proceeded and privileged material was both disclosed and admitted into evidence against Lott, this Court could find that the privileged material should not have been used against him and treat the admission just as we would any other evidentiary error. But as the Court of Appeals for the Second Circuit has noted, "a pertinent aspect of confidentiality will be lost, even though communications later deemed to be privileged will be inadmissible at trial." *Chase Manhattan Bank*, 964 F.2d at 165. The damage to the attorney-client relationship will have already been done by the disclosure itself. If we eat away at the privilege by expanding the fiction of "waiver" (which normally requires an intelligent and knowing relinquishment), pretty soon there will be little left of the privilege.

Privileged communications are not merely withheld from admission against the holder. Instead, the privilege operates to prevent the disclosure itself. In that way, privileges can be distinguished from other rules of admissibility:

[Some] rules of evidence that do not function as privileges . . . are justified on the ground that they foster some extrinsic policy; e.g., the rule barring evidence of subsequent repairs . . . . One may object to the introduction of evidence of subsequent repairs, but one may not legally refuse to disclose whether or not such repairs have been made.

23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5422, at 668 (1980 & supp. 2005). With privileged communications, in contrast, one may simply refuse to reveal the confidences communicated to an attorney. Mandatory disclosure of the communications is the

exact harm the privilege is meant to guard against, and this disclosure is not remedied merely because a disclosed confidence is not used against the holder in a particular case. It "will not suffice to ensure free and full communications by clients who do not rate highly a privilege that is operative only at the time of trial." *Chase Manhattan Bank*, 964 F.2d at 165. If the District Court's discovery order is in error and Lott's counsel is wrongfully forced to disclose privileged communications, there is no way to cure the harm done to Lott or to the privilege itself, even if some of the disclosure's consequences could be remedied on direct appeal.

II. The Merits

Turning now to the merits of the District Court's privilege ruling, we find that mandamus is justified because the District Court's order is clear error as a matter of law. *Cf. Bendectin*, 749 F.2d at 304.

There is no question that the attorney-client privilege remains applicable in habeas proceedings. "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." Fed. R. Evid. 1101(c) (emphasis added). The Rules of Evidence make it abundantly clear that the attorney-client privilege stands in all federal judicial proceedings, which would include habeas proceedings where petitioners assert actual innocence. The commentators make clear that the applicability of the privilege rules in all proceedings "means that privileges can apply even in situations where the other rules of evidence are not applicable." 31 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 8076, at 618 (2000); *See* also *id.* at 614 ("The policy behind extending privilege law to all proceedings is that the values protected by privileges can be destroyed by permitting disclosure of privileged material in any judicial context.").

Similarly, the Rules governing discovery indicate that privileged information is not subject to ordinary discovery. Habeas Rule 6(a) permits district courts to authorize discovery in habeas corpus proceedings "if and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so." Rules Governing Section 2254 Cases in the United States District Courts, R. 6(a). Rule 6(a) further directs that discovery is to be conducted in accordance with the Federal Rules of Civil Procedure. *Id.* The Rules of Civil Procedure define the scope of discovery as follows: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ." Fed. R. Civ. P. 26(b)(1) (emphasis added). The Rules make clear that privileged material, even relevant privileged material, is not discoverable. There are no exceptions to these rules that would permit the discovery of privileged materials in this habeas proceeding. The discovery the District Court has ordered should therefore only proceed if Lott has waived the attorney-client privilege.

In the discovery order, the District Court did not rule that the attorney-client privilege was inapplicable. Instead, the District Court found that through asserting a claim of innocence, Lott should be deemed to have "waived" the privilege—clearly, a legal fiction if "waiver" means a voluntary act.

The privilege may be waived expressly or by implication in several ways. Generally, "the 'attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties. In addition, a client may waive the privilege by conduct which implies a waiver of the privilege or a consent to disclosure." *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 294 (6th Cir. 2002) (internal citations omitted). The privilege may be implicitly waived by

claiming ineffective assistance of counsel or by otherwise raising issues regarding counsel's performance:

The privilege is held to be waived when a client attacks the quality of his attorney's advice through, for example, a civil defendant's pleading of an advice-of-counsel defense or a criminal defendant's appeal on grounds of inadequate legal representation. The doctrine is also invoked to waive a personal injury plaintiff's physician-patient privilege and to waive the psychiatrist-patient privilege of a criminal defendant pleading an insanity defense. These allegations have one thing in common: the pleading places at issue the subject matter of a privileged communication in such a way that the party holding the privilege will be forced to draw upon the privileged material at trial in order to prevail.

Developments in the Law-Privileged Communications, Implied Waiver, 98 Harv. L. Rev. 1629, 1638 (1985); *See* also *U.S. Fire Insurance Co. v. Asbestospray, Inc.*, 182 F.3d 201, 212 (3d Cir. 1999) (party waives the privilege only when he or she "as made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue"); *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 (7th Cir. 1995). ("The attorney-client privilege is generally waived when the client asserts claims or defenses that put his attorney's advice at issue in the litigation.").

Similarly, in the habeas context, courts have found implied waiver of these privileges when the petitioner "injects into [the] litigation an issue that requires testimony from its attorneys or testimony concerning the reasonableness of its attorneys' conduct." *Johnson v. Alabama*, 256 F.3d 1156, 1178 (11th Cir. 2001). The implied waiver in habeas proceedings has typically been the result of a petitioner's assertion of his own counsel's ineffectiveness. *See id.* ("By alleging that his attorneys provided ineffective assistance of

counsel in their choice of a defense strategy, [the petitioner] put at issue—and thereby waived—any privilege that might apply to the contents of his conversations with those attorneys to the extent those conversations bore on his attorneys' strategic choices."); *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003); *See also Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) ("When a client calls into public question the competence of his attorney, the privilege is waived.").

Implied waivers are consistently construed narrowly. Courts "must impose a waiver no broader than needed to ensure the fairness of the proceedings before it." *Bittaker*, 331 F.3d at 720 (habeas proceeding). "A broad waiver rule would no doubt inhibit the kind of frank attorney-client communications and vigorous investigation of all possible defenses that the attorney-client and work product privileges are designed to promote." *Id.* at 722. In another recent case from the Northern District, the Court applied implied waiver, but rejected an attempt by the warden to unnecessarily pierce the attorney-client privilege. *See Mason v. Mitchell*, 293 F. Supp. 2d 819, 823-24 (N.D. Ohio 2003). In *Mason*, the district court found that the petitioner implicitly waived the attorney-client privilege by putting his attorney's performance at issue, but was careful to note that "the waiver in habeas cases should be limited to the extent necessary to litigate a petitioner's ineffective assistance of counsel claims." *Id.* (citing *Bittaker*, 331 F.3d at 722). As such, the *Mason* court rejected the warden's request "to question the Petitioner about what he told his trial counsel regarding his involvement in the crime." *Id.* Also in *Mason*, while the District Court found the petitioner had implicitly waived the work product privilege regarding a psychiatric examination, that waiver did not extend to the privilege surrounding any inculpatory statements the Petitioner may have made to the psychiatrist. *Id.* at 825.

To be sure, litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case. "The attorney-client privilege cannot at once be used as a shield and a sword." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). But, while the sword stays sheathed, the privilege stands.

In this case, the District Court applies implied waiver in a completely new context. Rather than finding that Lott had put his attorney's performance or strategic decisions at issue and determining that he took the affirmative action to waive the privilege, the court finds waiver in Lott's assertion that the police invented the confession and in his assertion that he is innocent. Neither of Lott's assertions relate to what his attorney knew or did in this case. Instead, they are assertions about Lott's actions, *i.e,* whether he killed McGrath and whether he confessed to the killing to the police. We have not been able to discover a single case where a court has found that implied waiver applied in a similar fashion.

Likewise, in her response to Lott's petition for mandamus, the District Court cites no authority for her implied waiver ruling. In accounting for her order, she writes: "A habeas court may imply a waiver of privilege to the extent necessary for the State to defend the claims a habeas petitioner raises." This broad statement does not take into account necessary distinctions. The standard for implied waiver is not lower in habeas cases than it is in any other type of case. The privilege remains the client's, and the client must take some affirmative step to waive it. While raising certain claims in habeas proceedings might require petitioners to make a limited waiver of the privilege, implied waiver is limited to situations where the petitioner has made the confidential relationship the subject of a constitutional inquiry. Importantly, the waiver is implied from the nature of the claim, not from the nature of the proceeding.

The court's ruling on implied waiver was not based in any way on Lott's injection of his communications with his attorney into the proceedings All agree that Lott has put neither the performance of his attorney nor the content of their confidential communications before the court. Instead, the court suggests that the assertion of actual innocence itself amounts to an implied waiver of the attorney-client privilege. In essence, the District Court ruled that the attorney-client privilege is simply not applicable in this peculiar, little area of the law where a habeas petitioner asserts his actual innocence of the crime for which he was convicted.

In his dissenting opinion from this Court's order issuing a stay of discovery, Chief Judge Boggs indicates that the District Court might find support in the Supreme Court's opinion in *Schlup v. Delo*, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995). *Schlup* does not involve, mention or rule on any privilege. In *Schlup*, an opinion that preceded Congress's enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), the Court ruled that, in order to bring an otherwise barred claim, a habeas petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." 513 U.S. at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him" in light of all of the evidence. *Id.* at 327. Pointing out that this standard was directed toward "actual innocence," the Supreme Court wrote:

In assessing the adequacy of petitioner's showing [of actual innocence], the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.

513 U.S. at 328. The *Schlup* Court recognizes that in evaluating claims of innocence, habeas courts should consider "a broader array of evidence" than that available at trial.

To be certain, the *Schlup* Court indicates that the rules of admissibility do not limit the evidence that can be considered by a court evaluating a claim of actual innocence. Confidential statements made to attorneys are generally not admitted into evidence, but that is not because those statements are "inadmissible" in the normal sense. It is because those statements are protected by the attorney-client privilege, and that privilege enables the holder of that privilege to bar disclosure of otherwise admissible, confidential communications. If Lott made statements to his attorney concerning his guilt or innocence, those statements are unquestionably relevant to the determination of whether or not he is innocent. Moreover, his statements to his attorney if not privileged are admissible against him and would have been admissible against him in his original trial. No rule of evidence forbids the admission of statements by a criminal defendant made voluntarily to an attorney. If the privilege had been intentionally waived, the statements could certainly have been admitted.

By freeing district courts of the strictures of the rules of admissibility, the *Schlup* Court makes no suggestion that courts are likewise unbound by the rules of privilege. It can hardly be said that the Court would take such a large leap silently. The distinction between admissibility and privilege is no stranger to the Supreme Court or any other. Suspending the rules of admissibility while preserving the rules of privilege is not an unusual event. The Federal Rules of Evidence direct courts to do just that in almost every single judicial proceeding: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a

privilege, or the admissibility of evidence shall be determined by the court . . . . In making its determination, it is not bound by the rules of evidence except those with respect to privileges." Fed. R. Evid. 104(a) (emphasis added); *See* also Fed. R. Evid 1101(d); *Bourjaily v. United States*, 483 U.S. 171, 177-78, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987). Bearing this distinction in mind, it becomes clear that *Schlup* does not alter the rules of privilege.

The policies underlying privilege counsel strongly against expanding the scope of implied waiver. It is important to cabin the implied waiver of privileges to instances where the holder of the privilege has taken some affirmative step to place the content of the confidential communication into the litigation. The District Court's order would require that the privilege yield to reveal whether Lott ever made any statement inconsistent with that of an innocent man. Permitting this order to stand would place in jeopardy not only the attorney-client privilege, but also other important privileges such as the privilege between husband and wife, the privilege between patient and psychiatrist, or even the privilege between the penitent and their clergy. Since there is no linkage between the implied waiver ruling and the nature of the privileged relationship, there would be no logical reason to limit the ruling solely to the attorney-client relationship. A petitioner's discussions with his wife, his psychiatrist, or his priest would similarly be fair game when a petitioner asserts innocence. Demanding that a person waive any of these privileges in order to assert that he is innocent of a crime is inconsistent with society's historical insistence that these confidential relationships deserve protection.

It should also be noted that the contention of a habeas petitioner that he is innocent is not all that different from a criminal defendant's assertion that he is not guilty of a crime. If the attorney-client privilege should fail due to the assertion of innocence by a man who has confessed to his attorney, it is

difficult to conceive why the privilege determination would be different for a criminal defendant who pleads not guilty. Breaking down the privilege in this case where the content or consequence of the confidential communications is not at issue would undermine the privilege at other stages of the proceedings where the party asserts innocence as a defense. The privilege would also be waived at trial after a plea of not guilty. The focus on actual innocence "does not modify the essential meaning of 'innocence.'" *Schlup*, 513 U.S. at 328 (noting that it is firmly established that "the line between innocence and guilt is drawn with reference to a reasonable doubt"). The fact that the habeas petitioner is proceeding in civil rather than criminal court and now bears the burden of proof is largely insignificant to the rules of privilege. *Swidler & Berlin v. United States*, 524 U.S. 399, 408-09, 141 L. Ed. 2d 379, 118 S. Ct. 2081 (1998) ("There is no case authority for the proposition that the privilege applies differently in criminal and civil cases."). Our dissenting colleague apparently does not see that this unity of civil and criminal law in respect to the privilege is a significant inconsistency in his argument in favor of piecemeal erosion of the privilege.

There is no way to affirm the District Court's ruling without abandoning centuries of jurisprudence concerning the scope of the attorney-client privilege and endangering the full and frank communication between clients and attorneys.

We therefore GRANT mandamus relief and SET ASIDE those portions of the District Court's order which hold that Lott's assertion of actual innocence effects an implied waiver of the attorney-client privilege and those portions of the order directing discovery in accordance with that holding. The case is REMANDED to the District Court with instructions to VACATE the order insofar as it is inconsistent with this opinion.

DISSENT

Boggs, Chief Judge, dissenting. By concluding both that the loss of confidentiality is itself sufficient to warrant mandamus relief and that Lott's claim of actual innocence does not impliedly waive his attorney-client privilege, today's decision upsets this court's mandamus jurisprudence and elevates the privilege above trial protections guaranteed by the Constitution or other rules of evidence. It does so, I believe, in disregard of the Supreme Court's decision in *Schlup v. Delo*, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995). I cannot agree with the course the court now charts, which is yet another step in transforming the extraordinary instance of a claim of actual innocence into an everyday litigation tactic, and I therefore respectfully dissent.

Lott is before this court on a petition for mandamus relief, which is "a drastic remedy, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought." In re Parker, 49 F.3d 204, 206 (6th Cir. 1995). In determining whether petitioner is entitled to this remedy, our court evaluates his claim according to a five-part test. *In re Chimenti*, 79 F.3d 534, 540 (6th Cir. 1996). I disagree with the court's evaluation of Lott's petition as to two of these factors. My main point of departure with the court concerns the third factor: whether the district court committed any error at all, let alone a clear error. Furthermore, the court also incorrectly evaluates whether Lott will suffer any injury that could not be remedied on appeal, which is the second factor.

I.

The novel issue in this case is whether a petitioner who asserts his actual innocence impliedly waives the attorney-client privilege he holds as to his trial counsel. I would conclude that he does based on the extraordinary nature of the actual innocence inquiry under *Schlup*, 513 U.S. 298, 130

L. Ed. 2d 808, 115 S. Ct. 851. n1, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 I would accordingly deny Lott's mandamus petition.

> n1 While I conclude the district court's conclusion is manifestly correct, such firmness in belief is not necessary to deny the writ of mandamus. Between the district court being clearly correct, as I believe, and it clearly erring, as the court believes, lies a quite extensive gray area. If this issue were to fall into that area, I believe the mandamus petition would have to be denied. While the question of whether the district court is clearly erroneous as a matter of law is just one factor out of the five we balance, *Chimenti*, 79 F.3d at 540, the Supreme Court has put significantly greater emphasis on the issue. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661, 57 L. Ed. 2d 504, 98 S. Ct. 2552 (1978) ("Whereas a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.'") (quoting *Will v. United States*, 389 U.S. 90, 98 n. 6, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967)); *See* also *Parker*, 49 F.3d at 206 (granting relief only when petitioner demonstrates "a clear and indisputable right to the relief sought").

To be clear, the sole reason that Lott should not enjoy the attorney-client privilege in his second pursuit of habeas relief is that he presents a claim of actual innocence, invoking *Schlup v. Delo*, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851. No one doubts that habeas petitioners generally enjoy attorney-client privilege. Fed. R. Evid. 1101(c). Nor has the district court foisted *Schlup's* demanding standard onto petitioner; Lott himself presents *Schlup* as a foundational case for his claim in his second petition. He asserted actual

innocence in his first habeas petition as well. In re Lott, 366 F.3d 431, 435 (6th Cir. 2004) (Boggs, C.J., dissenting).

A.

As other courts have observed, "'the doctrine of implied waiver allocates control of the privilege between the judicial system and the party holding the privilege.'" *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003) (en banc) (quoting Developments in the Law-Privileged Communications, 98 Harv. L. Rev. 1450, 1630 (1985)). Thus, "the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). The typical example of such situations, in the habeas context, is when a petitioner asserts that his counsel was ineffective. *See*, e.g., *Bittaker*, 331 F.3d at 716 ("It has long been the rule in the federal courts that, where a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer.")

But there is no reason to believe that the typical circumstance is also the only circumstance in which a petitioner will impliedly waive privilege. Lott presents a claim of actual innocence under *Schlup*, which is "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). The district court is required to determine if Lott in fact committed the murder. *See Sawyer v. Whitley*, 505 U.S. 333, 340, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) ("A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime."). As *Schlup* and *Bousley* make clear, the "actual innocence" inquiry is a fundamentally different one than that typical of legal proceedings. While the inquiry

still requires reference to reasonable doubt, *Schlup*, 513 U.S. at 328, a claim of actual innocence greatly expands the scope of relevant evidence. The Court explained the standard as follows:

> In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, . . . we believe that Judge Friendly's description of the inquiry is appropriate: The habeas court must make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'"

Id. at 327-28 (emphases added) (quoting Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)). When adjudicating a claim of actual innocence, both the court and the parties are "through the looking glass." They engage in a fundamentally new inquiry where previous limitations on evidence do not apply.

Fairness thus requires that a petitioner who asserts that he is innocent 'in light of all the evidence' have his claim evaluated 'in light of all the evidence.' *Id.* at 328 (quoting Friendly, 38 U. Chi. L. Rev. at 160). Therefore, I would conclude that Lott's implied waiver of the attorney-client privilege is "essential to achieving a just resolution of the case." *United States v. Exxon Corp.*, 94 F.R.D. 246, 249 (D.D.C. 1981). *Schlup* directly authorizes courts to inquire into "relevant evidence . . . unavailable at trial." 513 U.S. at 328. The conversations and documents protected by Lott's

attorney-client privilege fall neatly into that category. Some of those documents are certainly relevant evidence to his actual innocence, n2 and were properly neither admitted nor made available at trial because of Lott's privilege. But Justice Stevens's opinion could hardly be more clear that neither the admissibility nor availability of privileged materials is relevant in proceedings under *Schlup*.

> n2 The district court will screen the documents for relevance to Lott's actual innocence or *Brady* claims via in camera inspection before turning them over to respondent. *See* Pet'r App. 52-53 (district court discovery order).

The court attempts to evade this passage by distinguishing the protections afforded by privilege and the protections afforded by other rules of evidence. Of course, it is true that, unlike most rules of evidence, the rules of privilege insulate communications from both discovery and admission in court. *See* Fed. R. Civ. P. 26(b)(1) (excluding from discovery privileged communications). However, the court's distinction, while correctly drawn, is between one kind of evidence and other kinds of evidence. *See* Fed. R. Evid. 501 (federal rule concerning privileges). *Schlup*, on the other hand, is concerned with any "relevant evidence," 513 U.S. at 327, and makes no reference to excluding one form or another based on what rule protects it, *id.* at 327-28. In other words, given *Schlup's* guidance, the court draws a distinction without a difference.

The court continues by arguing that the Supreme Court is aware of the difference between the rules of admissibility and those concerning privilege. It therefore notes that "suspending the rules of admissibility while preserving the rules of privilege is not an unusual event." Slip Op. at 8. Agreed. But the Supreme Court's familiarity with the distinction today's opinion now draws speaks volumes for

the Court's decision not to draw the distinction itself. While *Schlup's* discussion of relevant evidence is short, at no point does Justice Stevens exclude any evidence from the consideration. 513 U.S. at 327-28. Indeed, it refers to considering "all of the evidence." *Id.* at 328. Moreover, the passage directs courts to suspend the rules of admissibility. *Id.* at 327. Though privilege protects more than admissibility, it also prevents admitting privileged information and, thus, could be described as a rule of admissibility. While the court finds it difficult to believe that such a large leap would be taken silently, Slip Op. at 8, I find it harder to justify inferring from what it considers silence a distinction found nowhere in the Supreme Court's reasoning.

A broader reading of *Schlup* confirms that the investigation into all evidence should include evidence otherwise protected by privilege. Actual innocence serves as an exception for otherwise procedurally defaulted claims on the basis that the petitioner is "entirely innocent." *Schlup*, 513 U.S. at 325. The petitioner is therefore arguing it is a "fundamental miscarriage of justice" for him to remain incarcerated. *See id.* at 324-25. Actual innocence claims are meant for the "truly deserving," and thus also the "extraordinary case." *Id.* at 321. For a petitioner to show he is entirely innocent, and that he is truly deserving of extraordinary relief, one would think he must be willing to test his innocence against literally all the evidence, including whatever is protected by privilege.

Though this conclusion may seem unduly harsh, one must remember what a petitioner waives by placing his actual innocence at issue. The attorney-client privilege, even compared to other privileges, has an exalted place in our jurisprudence. *See Philip Morris*, 314 F.3d at 618 ("The attorney-client privilege rests at the center of our adversary system . . . ."). But claims of actual innocence require petitioners to surrender much of the normal protections they would enjoy at trial that are guaranteed by the Constitution,

not to mention other more commonplace protections afforded by evidentiary rules. Given the *Schlup* Court's approval of Judge Friendly's article concerning habeas relief based on claims of innocence, 513 U.S. at 321-22 & 328, it is beyond peradventure that evidence seized in violation of the Fourth Amendment could be used in determining if petitioner was actually innocent. Friendly, 38 U. Chi. L. Rev. at 160. This court has already decided that a statement given in violation of Lott's Sixth Amendment rights can be used against him in determining his actual innocence. *Lott v. Coyle*, 261 F.3d 594, 621 (6th Cir. 2001). I see no reason why petitioner's rights under the Self-Incrimination Clause of the Fifth Amendment would fare any better. The Confrontation Clause of the Sixth Amendment primarily addresses the introduction of out-of-court statements at trial. *Crawford v. Washington*, 541 U.S. 36, 50-51, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). Thus, the admissibility alone of certain evidence raises concerns of constitutional magnitude. n3 There is no room, however, in an actual-innocence determination under *Schlup* for the exclusion of evidence under the Confrontation Clause. *Cf. Doe v. Menefee*, 391 F.3d 147 (2d Cir. 2004) (considering questionable hearsay testimony in actual innocence inquiry because *Schlup* demands review based on all the evidence). If trial protections guaranteed by the Fourth, Fifth, and Sixth Amendments of the Constitution are waived by habeas petitioners making claims of actual innocence, one must pause to wonder why the attorney-client privilege is not, as well. It may not be hyperbole to suggest, as the court does, that the attorney-client privilege is foundational to the adversary system, Slip Op. at 4, but the Bill of Rights is no less foundational to our courts or society.

n3 This was even more pronounced under the Confrontation Clause analysis of *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), under which hearsay statements could be admitted if

they fell within a "firmly rooted hearsay exception." *Id.* at 66.

Thus, the fact that the attorney-client privilege already has a doctrine of implied waiver weakens, rather than strengthens, the court's position. There is no doctrine of implied waiver of rights guaranteed by the Constitution and yet this court has seen fit to waive, in this very hearing, a protection created by Lott's Sixth Amendment rights. The rationales expressed in most implied-waiver cases speak of doing fairness to the opposing party. *See Bittaker*, 331 F.3d at 720. Doing fairness to the state in an actual-innocence context may require that a petitioner impliedly waives his privilege. In this case, the parties are reexamining a crime where the only witness to the crime, other than the perpetrator, passed away almost twenty years ago. Finding witnesses and any remaining relevant evidence concerning this crime will be difficult. *See Bousley*, 523 U.S. at 631 (Scalia, J.) (discussing difficulties facing federal investigators for crime eight years in the past where the defendant pleaded guilty). However, especially in a case like this, where there has always been some possibility that the petitioner confessed to the crime, the state should in fairness be allowed to evaluate the records of trial counsel.

B.

Contrary to the reasoning of the court, I further believe that the principles surrounding attorney-client privilege favor extending implied waiver to the assertion of actual innocence. The district court found only that petitioner had waived attorney-client privilege as to his trial counsel in asserting his actual innocence under *Schlup*. While my reasoning would likely lead me to conclude that a petitioner asserting actual innocence would also waive other privileges, that fact does not give me pause. It is a necessarily result of an assertion that one is actually innocent and a victim of a fundamental miscarriage of justice. Moreover, the attorney-

client privilege is more critical to our system of justice than other privileges. *See Jaffee v. Redmond*, 518 U.S. 1, 11, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996) (establishing psychotherapist-patient privilege on basis of public good in improving mental health). In a context where illegally seized evidence, confessions extracted without Miranda warnings, and out-of-court testimonial statements can be employed, maintaining the psychotherapist-patient privilege, just to name one, would be odd indeed.

However, I cannot state strongly enough that the district court's judgment does no violence to claims of attorney-client privilege in other contexts. I must admit to being baffled by the court's suggestion that the district court's judgment or the opinions expressed in this dissent will lead to an unraveling of the attorney-client privilege. *See* Slip Op. at 9. Any fair reading of the Court's actual-innocence jurisprudence makes clear the error in this assertion. While the determination is still made with reference to innocence, it is "factual innocence" that the court considers based on all relevant evidence. *Bousley*, 523 U.S. at 623; *Schlup*, 513 U.S. at 327-28. When both the court and the parties step "through the looking glass" to consider a petitioner's actual innocence, they engage in an inquiry of a fundamentally different kind. A claim of actual innocence thus places unique demands on the attorney-client privilege, based on values that do not transfer to other areas of law.

Despite the attorney-client privilege's pedigree, it is to be narrowly construed because, like all other privileges, it is "in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974). It "'applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice." *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 293 (6th Cir. 2002) (quoting *In re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th

Cir. 1986)). Applying waiver only when a petitioner raises a claim of actual innocence does little harm to the privilege's purpose of promoting open communication between attorney and client. *See Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981) (giving purposes served by attorney-client privilege). It frankly blinks at reality to believe that a criminal defendant will be less candid with his attorney because of his possible assertion of a claim that would likely only be raised after conviction, a full course of appeals in the state courts, post-conviction review in the state courts, and federal habeas review. The purposes of the privilege are not harmed by this ruling. n4

> n4 The attorney-client privilege's role in insuring effective advocacy, *see Philip Morris*, 314 F.3d at 618, may be good reason to hold that a petitioner does not impliedly waive the privilege as to communications with his current counsel when he asserts his actual innocence. That question, however, is not before us as the district court's ruling is specifically limited to Lott's trial counsel.

In addition, even if the values animating the privilege were incrementally diminished by this reasoning, Rule 501 of the Federal Rules of Evidence authorizes federal courts to determine the scope of privilege "in the light of reason and experience." Courts have thus been willing to limit the privilege's applicability when policy considerations counsel otherwise. *See In re Witness Before Special Grand Jury* 2000-2, 288 F.3d 289, 292-94 (7th Cir. 2002); In re Lindsey, 332 U.S. App. D.C. 357, 158 F.3d 1263, 1275-78 (D.C. Cir. 1998); In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920-21 (8th Cir. 1997) (all rejecting a governmental attorney-client privilege in grand-jury proceedings); *See* also *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998) (noting that governmental assertion of the attorney-client privilege conflicts with "the strong public interest in open and honest

government"). But see In re Grand Jury Investigation, 399 F.3d 527, 532 (2d Cir. 2005) (allowing governmental assertion of privilege in grand jury context to foster open communication). The actual-innocence claim attempts to strike a balance between the interests in finality and comity, on the one hand, and individualized justice on the other. *Schlup*, 513 U.S. at 321. The privilege already limits the truth-gathering function of the court and, thus to some extent, also individual justice. Cf. In re Grand Jury Investigation, 399 F.3d at 532 ("The idea that a robust attorney-client privilege will in fact 'promote broader public interests' does not mean that application of the privilege will render justice in every single case."). Now, under the court's decision today, the privilege will also be used to oppose finality and comity by prolonging the fair disposition of such claims and encouraging their proliferation.

II.

The second factor for determining if a petitioner is entitled to mandamus relief is whether the petitioner "will be damaged or prejudiced in a way not correctable on appeal." *Chimenti*, 79 F.3d at 540. The court's conclusion that Lott will be irreparably harmed by his loss of confidentiality he enjoyed in communications with his trial counsel is a departure from both this court's and our sister courts' examinations of the issue and will weaken the flexibility central to our mandamus jurisprudence. *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997); *Chimenti*, 79 F.3d at 539.

Petitioner's case differs substantially from the complex commercial suits in which discovery orders have been deemed grounds for mandamus review. *See*, e.g., United *States v. Philip Morris*, 354 U.S. App. D.C. 171, 314 F.3d 612, 614 (D.C. Cir. 2003) (granting interlocutory appeal under collateral order doctrine in federal RICO prosecution); *Perrigo*, 128 F.3d at 432 (granting mandamus review in

stockholder derivative suit), *Chase Manhattan Bank, N.A. v. Turner & Newall*, PLC, 964 F.2d 159, 160-62 (2d Cir. 1992) (same result in case concerning asbestos installation). As I observed when the court granted Lott a stay pending this decision, "this difference matters, not because the harm facing Lott is any less (quite the opposite), but because it impacts this court's ability to remedy that harm on appeal." *In re Lott*, 139 Fed. Appx. 658, 2005 U.S. App. Lexis 12280, No. 05-3532, 2005 WL 1515367, at *7 (6th Cir. June 22, 2005) (Boggs, C.J., dissenting). In the conventional instance, encroachments on the attorney-client privilege will make effective appellate review and remedy impossible. The wrongfully gained discovery will produce 'fruit of the poisoned tree' problems. *Chase Manhattan Bank*, 964 F.2d at 165. Courts would find it impossible to separate the "poisoned" evidence and theories from those not compromised by wrongful disclosure. *See Philip Morris*, 314 F.3d at 619 ("It would be impossible for a court to sort out and redress the harm caused by the incorrect disclosure."). As one of our sister circuits has accurately, if colorfully, put it, "there is no way to unscramble the egg scrambled by disclosure." *In re Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997).

That concern is not present in this case, where nearly twenty years of litigation in state and federal courts have crystallized the points of contention between the parties. We already know the evidence that the state seeks to extract from Lott's trial attorneys: that Lott admitted to them either that he committed the murder or that he confessed to police. They seek to extract this evidence for one reason only: to convince the district court that Lott is not actually innocent of the crime for which he was convicted. Were this case then to reach us on appeal, and Lott were to press the claim on which the court now grants relief, our position would be a familiar one to any appellate court. Were we to agree with Lott's position, we would exclude the evidence and remand to the

district court, following the same procedure we do in any evidentiary dispute. That is, we could remedy any error, if indeed there were error, on direct appeal.

Instead of disagreeing with this analysis, the court focuses instead on a different harm, the inherent harm of losing confidentiality. *See* Slip Op. at 5 ("The damage to the attorney-client relationship will have already been done by the disclosure itself."). No case from our sister circuits, however, focuses on that harm divorced from its practical consequences to the litigants. In *Chase Manhattan Bank*, cited by the court, *ibid.*, the Second Circuit emphasized that disclosure of confidential documents to opposing counsel, even if not used at trial, would still cause practical harms to the party asserting privilege. *Chase Manhattan Bank*, 964 F.3d at 165. Our sister circuit observed that even temporary disclosure would allow "evidentiary leads or give insights regarding various claims and defenses" to which opposing counsel would not otherwise be entitled. *Ibid.*; *See also Ford Motor Co.*, 110 F.3d at 963 (noting similarly harmful effects). Thus, when both the Second and Third Circuits have noted that discovery of privileged materials "'will not suffice to ensure free and full communication by clients who do not rate highly a privilege that is operative only at the time of trial," *ibid.* (quoting *Chase Manhattan Bank*, 964 F.3d at 165), our sister circuits recognized that clients would be concerned with the practical consequences of that disclosure, i.e. opening a Pandora's box of wrongly gained evidence and legal theories. That risk is not presented by the facts of this case.

More important, however, is the court's marked departure from our own court's mandamus jurisprudence. In this court, mandamus relief is "an extraordinary remedy, only infrequently utilized." *Perrigo*, 128 F.3d at 435. While we have granted mandamus relief to protect a party's attorney-client privilege, we have done so based on the circumstances

of the case with emphasis on the flexibility our case law affords. *See id.* at 437 (emphasizing the circumstances surrounding the claim). We recognized that discovery-based violations of the privilege "may bring about irreparable harm." *Ibid.* (emphasis added). Until today's opinion, however, we have never held that a discovery-based violation automatically will bring about irreparable harm. But that is the inevitable conclusion of the court's reasoning, as there is no violation of privilege that will not result in some loss of confidentiality. Nor can today's opinion be limited to the context of the attorney-client privilege because any loss of privilege will result in a diminution in confidentiality. More importantly, a party can assert that it will be harmed in a way not revocable on appeal without any concern for the context in which the harm is asserted. It seems that any party seeking to shield communications protected by any privilege can draw on the mandamus jurisdiction of this court, so long as some of the other conditions are met. *See Parker*, 49 F.3d at 207 (noting factors are to be balanced and the absence of one factor does not doom petition for relief).

Today's departure from our previous mandamus jurisprudence will have deleterious effects. As to this factor in the mandamus balancing, this court is now without any flexibility in addressing whether a litigant will be harmed. n5 Our court will inevitably see more petitions for writs of mandamus, but will have fewer tools with which to distinguish the extraordinary from the mundane. With the rise in mandamus petitions will come accompanying delays in the orderly administration of justice, which our mandamus jurisdiction is supposed to further, not weaken. *Perrigo*, 128 F.3d at 435 (citing *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1061 (6th Cir. 1982)). All this will be done in the service of privileges, which, despite their historical roots, are still a set of doctrines that "contravene the fundamental principle that 'the public . . . has a right to every man's evidence." *Trammel v. United States*, 445 U.S. 40, 50, 63 L. Ed. 2d 186,

100 S. Ct. 906 (1980) (alteration in original) (quoting *United States v. Bryan*, 339 U.S. 323, 331, 94 L. Ed. 884, 70 S. Ct. 724 (1950)). Therefore, I would conclude that the loss of confidentiality, standing alone, is not sufficient to justify issuance of a writ of mandamus.

> n5 Perhaps the court wishes to adopt the positions of two of our sister circuits and allow immediate appeals under the collateral order doctrine, *see* Slip Op. at 2 n.2, but that is not and has never been the law in this circuit. *See FDIC v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990) (denying jurisdiction under the collateral doctrine in case involving governmental privileges).

III.

For these reasons, I would conclude that petitioner, by asserting his actual innocence, has impliedly waived the attorney-client privilege as to his trial counsel. While I believe a fair reading of *Schlup* requires this conclusion, the conclusion is further confirmed by the policies surrounding claims of actual innocence and consideration of the other evidence that will be admitted. Furthermore, I cannot agree with the court's reasoning in finding that Lott will endure any irreparable harm if we were to consider his claim only following a final judgment by the district court. I therefore respectfully dissent.

APPENDIX B

GREGORY LOTT, Petitioner,
vs.
MARGARET BRADSHAW, Warden, Respondent.

United States District Court for the Northern District of Ohio

Case No. 1:04-CV-822

2005 U.S. Dist. Lexis 21227

KATHLEEN McDONALD O'MALLEY,
UNITED STATES DISTRICT JUDGE.

ORDER

Pending before the Court is the Respondent's Motion for Discovery, docket no. 19. The Respondent wishes to conduct discovery to develop an actual innocence claim based on *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), that the Petitioner, Gregory Lott, raised in his Successor Petition. Lott opposes the Motion, docket no. 26. Also pending are Lott's Motion for an Evidentiary Hearing, docket no. 16, and Motion to Expand the Record, docket no. 27. Lott seeks to develop the factual predicate of his claim through an evidentiary hearing and to expand the record to include a letter from the East Cleveland Police Department and an affidavit from trial counsel, James Kersey. The Respondent partially opposes both Motions, docket nos. 22, 36. For the following reasons, the Court grants in part and denies in part the Respondent's Motion for Discovery. The Court denies without prejudice Lott's Motion for an Evidentiary Hearing and grants in part and denies in part Lott's Motion to Expand the Record.

I. Pertinent Facts and Procedural History

Lott was convicted and sentenced to death for the murder of John McGrath. On July 15, 1986, police found McGrath in his home partially burned and suffering from dehydration. He died several days later of acute bilateral bronchopneumonia. The deputy coroner who examined McGrath noted abrasions on his wrist, knee, and ankle and ruled the death a homicide. At McGrath's house, police discovered a quart bottle of flammable lamp oil. The cap of the bottle was later found on McGrath's bed.

Lott was indicted, *inter alia*, for the aggravated murder of McGrath. Prior to trial, Lott confessed to Detective James Hughley that he had murdered McGrath. The trial court suppressed these statements, however, because Lott's trial counsel were not present when he made them. Since his August, 2002 clemency hearing, Lott has denied that he confessed to Detective Hughley.

The prosecutor adduced evidence at trial that, despite the fact that he was ignited with lamp oil, McGrath had no lamps in his home that would utilize this substance. In a police report, however, Detective Hughley wrote that a man who cleaned out McGrath's house after his death recalled that he had found an oil lamp in pieces in the living room. This police report was not supplied to defense counsel. Also withheld from the defense team was a description McGrath gave of his assailant shortly before he expired. In that statement, McGrath indicated that his assailant was a light-complected African-American male. McGrath also relayed in a subsequent statement that he believed he and his attacker used the same barber.

Upon exhausting his state court appeals, Lott filed a Petition for Writ of Habeas Corpus with this Court on February 3, 1997. *Lott v. Coyle*, 1:95 CV 2642, docket no. 19. Lott asserted in his third ground for relief that the prosecutor

withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Specifically, he asserted that the prosecution withheld McGrath's description of his assailant which, Lott claimed, did not match his physical appearance. The Court found that Lott had neither adequately explained when counsel first received McGrath's description, nor established sufficient cause and prejudice to excuse any default for failing to raise this issue with the state court. *Id.*, docket no. 110, at 59-60. The Court ultimately denied Lott's petition, finding that his all of his claims were either defaulted, without merit, or both.

After affirming this Court's Memorandum of Opinion, *Lott v. Coyle*, 261 F.3d 594 (6th Cir. 2001), the Sixth Circuit held that, because the Ohio courts now had completed their review of Lott's *Brady* claim in a second petition for post-conviction relief, he was entitled to a merit review of that claim in federal habeas court. In re Lott, 366 F.3d 431 (6th Cir. 2004). It found that, because Lott had made a prima facie showing that he was entitled to file a Successor Petition, the case should be remanded to this Court to adjudicate his *Brady* claim. n1

> n1 Reasoning that it was through no fault of Lott or his counsel that the Court did not previously consider the constitutional merits of the claim, the Sixth Circuit held that the pre-Anti-Terrorism and Effective Death Penalty Act successor petition statute was the appropriate standard by which to determine if Lott was entitled to file a second petition. *Id.* at 432.

In his Successor Petition, Lott asserts that he is actually innocent of McGrath's murder and that he can establish his actual innocence through the very exculpatory evidence the prosecution withheld from him prior to trial. Lott asserts that his innocence and the government's violation of *Brady* justify an order setting aside his conviction.

II. Motion for Discovery

In her Motion, the Respondent requests that the Court permit discovery on fourteen (14) distinct people or entities. She asserts that discovery is necessary not only to rebut Lott's actual innocence claim, but to address the procedural barriers Lott must overcome to present his claim to this Court. Specifically, the Respondent requests that the Court permit her to:

1. Depose and request the production of documents from James Kersey;

2. Obtain testimony and the production of documents from the Office of Elmer Guiliani;

3. Depose and request the production of documents from Detective James Hughley;

4. Depose and request the production of documents from Petitioner Lott;

5. Depose and request the production of documents from Dale Baich;

6. Depose and request the production of documents from Randall Porter;

7. Depose and request the production of documents from J. Joseph Bodine, Jr.;

8. Obtain records depositions and request the production of documents from the Office of the Ohio Public Defender regarding trial and post-conviction counsel's files;

9. Depose and request the production of documents from members of the Ohio Parole Board who interviewed Lott;

10. Depose former East Cleveland Patrolman Peter Messina;

11. Depose former Cleveland Detective Peter Mahovlich;

12. Depose hospital personnel who cared for the victim, John McGrath;

13. Depose Craig Briss, Susan Shorr, Marthy Jacoby, Dr. Kurt Bertschinger, and Dr. James Eisenberg;

14. Depose Art McCoy.

Resp. Motion for Discovery, passim.

A party in federal habeas corpus litigation is entitled to discovery if "the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." R. Governing Section 2254 Cases 6(a). The "good cause" standard set forth in Rule 6 restrains a party litigant from unbridled entitlement to discovery. "At the very least, it is clear that there was no intention to extend to habeas corpus, as a matter of right, the broad discovery [afforded in] ordinary civil litigation." *Harris v. Nelson*, 394 U.S. 286, 295, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969)(citation omitted); *See also Lynott v. Story*, 929 F.2d 228 (6th Cir. 1991)(following Harris). Pursuant to this standard, the Court now addresses the Respondent's individual requests for discovery in the order in which they were presented in the Motion.

A. Deposition and Production of Documents from Trial Counsel

The Respondent first requests permission to depose trial counsel Kersey and obtain documents from both counsel's offices. n2 She wishes to depose Kersey regarding his knowledge of the victim's statements concerning his attacker, Lott's guilt or innocence of McGrath's murder, and his knowledge of Lott's confession to police. Lott opposes this discovery on several grounds. First, he argues that, because of the nature of the actual innocence claim he is asserting, the Respondent's right to discovery is curtailed. Lott also asserts that attorney-client privilege and the work product doctrine proscribe the Respondent from obtaining the information she seeks. The Court addresses both of these arguments in turn.

> n2 Kersey's co-counsel, Elmer Guiliani, is now deceased.

1. Actual Innocence Claim and Limitations on Discovery

Lott claims that the Respondent's ability to conduct discovery is limited by the type of actual innocence claim he asserts. He contends that his claim of actual innocence is neither a procedural (or "gateway") claim articulated by the United States Supreme Court in *Schlup v. Delo*, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995), nor a "free-standing" claim of actual innocence like the one the habeas petitioner asserted in *Herrera v. Collins*, 506 U.S. 390, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993). Instead, Lott argues that his claim of actual innocence is a "hybrid" claim, containing elements of both *Schlup* and *Herrera*. In *Schlup*, the Supreme Court created the standard for an actual innocence claim a petitioner could assert to excuse the procedural default of a distinct ground for habeas relief. In those instances, Lott explains, the habeas petitioner is asserting an actual innocence claim based on a constitutionally tainted trial. Conversely, in *Herrera*, the Supreme Court was confronted with a free-standing claim of actual innocence in which the petitioner did not assert that his

trial was constitutionally infirm, but simply argued that an unjust or incorrect result ensued from the trial. The Supreme Court imposed a higher burden of proof upon petitioners asserting *Herrera*-type actual innocence claims, finding it appropriate to do so where the petitioner had been afforded a constitutionally error free opportunity to have a jury assess his guilt or innocence.

Lott asserts that his claim is an amalgamation of these two claims. He contends that his claim is a free-standing claim of actual innocence that derives from the prosecution withholding exculpatory evidence. Thus, his free-standing actual innocence claim, Lott alleges, is one in which the trial was constitutionally tainted. Lott finds support for this "hybrid" actual innocence claim in the *Schlup* Opinion. He contends that the *Schlup* Court sanctioned this type of claim when it distinguished a *Schlup* procedural claim from a *Herrera*-type claim in which the petitioner asserts actual innocence based on a constitutionally fair trial.

Regardless of whether such a "hybrid" claim exists, and more pertinent to deciding the instant Motion, Lott argues that because he is asserting a "hybrid" actual innocence claim, this Court is limited in what discovery it may grant the Respondent. He claims the *Schlup* Court articulated these restrictions in the following excerpt from the Opinion:

Several observations about this standard are in order. The Carrier standard is intended to focus the inquiry on actual innocence. In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the Carrier standard, we believe that Judge Friendly's description of the inquiry is appropriate: The

habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."

Brief in Opp., at 5-6 (emphasis in original). From this quote, Lott gleans that only four types of evidence are subject to this Court's review, and hence discoverable by the Respondent. They are: (1) evidence presented at trial; (2) reliable evidence illegally admitted at trial; (3) evidence wrongfully excluded at trial; and (4) evidence that became available only after trial. Consequently, Lott asserts that the Court cannot consider his confession to Detective Hughley because it was rightfully (as opposed to wrongfully) excluded from trial. Moreover, he asserts that the Court cannot consider, and the Respondent may not obtain, evidence such as polygraph test results because it, too, would not have been admissible during trial. Conversely, Lott continues, this Court "can and must" consider the victim's identification evidence, the oil lamp evidence, and tainted eyewitness evidence. Brief in Opp., at 6.

It is noteworthy that, based on Lott's interpretation of *Schlup*, only evidence that would further his actual innocence claim is discoverable in this proceeding. The Court declines to read *Schlup* so narrowly. Instead, the Court finds that the *Schlup* holding, as quoted above, is meant to expand a district court's authority to hear evidence not adduced at trial. Rather than limiting the type of evidence admissible in a habeas proceeding, the *Schlup* Court enlarged its scope, permitting a district court to hear "relevant evidence that was either excluded or unavailable at trial." *Schlup*, 513 U.S. at 327-28. As Judge Friendly is quoted as saying in *Schlup*, the district court may consider "all the evidence" n3 including the categories of evidence Lott outlines above. This list was not

meant to be exhaustive. It places no specific limitations on what types of evidence a district court can hear, such as evidence that was properly excluded from trial, so long as that evidence is relevant. n4

> n3 The Court declines to accept Lott's conclusion that the "all the evidence" passage in Judge Friendly's description includes only "evidence presented at trial." Brief in Opp., at 6. In that passage, Judge Friendly notes that a habeas court may hear "all the evidence" including "wrongly excluded evidence." *Id.* at 328. Wrongly excluded evidence, by definition, cannot have been presented during trial.
>
> n4 This Court recognizes, as did the *Schlup* Court, that it must give "due regard" to the unreliability of any evidence it hears in a habeas proceeding. *Schlup*, 513 U.S. at 328. This reliability determination, however, is distinct from the discoverability decision the Court must make in granting or denying the Respondent's requests.

Lott asserts, moreover, that even if the Court finds that *Schlup* applies only to claims seeking to rely on actual innocence as a "gateway" to excuse an otherwise defaulted claim, the Court should still find that *Schlup* limits the evidence it can hear to only that necessary to find the petitioner legally, rather than factually, innocent. Thus, Lott concludes, the Court need only determine that he is not guilty beyond a reasonable doubt, rather than find him factually innocent of killing McGrath and that the scope of permissible discovery must be determined in light of this distinction.

The Court disagrees with Lott. The standard of proof the Court must use in adjudicating Lott's actual innocence claim is unrelated to determining the scope of discovery it may permit the Respondent to obtain. Instead, it bears only on the

standard the Court must utilize to render its decision on the claim once all evidence is before it. Consequently, the Court will neither consider nor define the relevant standard of proof when deciding the instant Motion.

2. Privilege Assertions and Limitations on Discovery

Lott next asserts that the attorney-client privilege and the work product doctrine restrains the Respondent from obtaining most of the discovery she seeks. The Respondent counters that Lott's assertion of actual innocence is a waiver of his attorney-client privilege. She contends, moreover, that, because Lott now is asserting in the Successor Petition that the police invented his confession, she is entitled to discovery to learn what information Lott revealed to counsel regarding his involvement in McGrath's murder.

This Court recently issued an Order examining a nearly identical privilege issue in the habeas context. The Court repeats relevant portions of that Order, stating the applicable law therein:

The attorney-client privilege is one of the oldest recognized privileges. "The privilege is intended to encourage 'full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 141 L. Ed. 2d 379, 118 S. Ct. 2081 (1998)(quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)). Although the privilege typically is the client's to assert or waive, courts have recognized that a client implicitly waives the attorney-client privilege by putting the attorney's performance at issue during subsequent litigation. *Hunt v. Blackburn*, 128 U.S. 464, 32 L. Ed. 488, 9 S. Ct. 125 (1888); *Bittaker v. Woodford*, 331 F.3d 715, 718-20 (9th Cir. 2003). In those types of cases, the court imposes an implied

waiver of the privilege to the extent necessary to litigate the claim. *Bittaker*, 331 F.3d at 720.

As the Respondent recognized in her Motion, another judge on this Court recently decided a similar privilege issue. In that case, the Court held that, "in determining the extent of the implied waiver in a habeas context, a court must balance the competing interests of the federal courts to fully litigate the habeas claim before it with the state's interests in maintaining the integrity of the state-created attorney-client privilege." *Mason v. Mitchell*, 293 F.Supp.2d 819, 823 (N.D. Ohio 2003)(citing *Bittaker*, 331 F.3d at 721). The Mason Court found that the petitioner had implicitly waived his attorney-client privilege by asserting ineffective assistance of counsel during the mitigation phase of trial but, only to the extent necessary to pursue this claim. n5

The Petitioner also asserts that the work product doctrine privilege covers the redacted portions of the documents. First recognized by the United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947), the work product doctrine was meant to promote justice and protect a client's interests by preventing opposing counsel from obtaining unrestricted access to an attorney's correspondence, briefs, mental impressions and other documents. *United States v. Nobles*, 422 U.S. 225, 237, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975). Because it is often necessary for attorneys to rely on investigators or other agents to accumulate materials in preparation of trial, "it is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself." *Id.* at 238-39. Like the attorney-client privilege, the work product doctrine may be waived. Absent waiver, however, an opposing party may not obtain "'opinion' work product of his adversary; i.e., any material reflecting the attorney's mental impressions, opinions, conclusions, judgments, or legal theories." *In re*

Columbia/HCA Healthcare Corp. - Billing Practices Litigation, et al. v. Columbia/HCA Healthcare Corp., 293 F.3d 289, 294 (6th Cir. 2002)(internal quotation marks and citations omitted).

Phillips v. Bradshaw, No. 5:03 CV 0875, at 2-3 (N.D. Ohio Apr. 30, 2004)(Order granting *in camera* inspection of documents).

> n5 There, the Court found that, because the Petitioner had asserted that trial counsel inadequately prepared him to present an unsworn statement, any attorney-client conversations regarding the unsworn statement were not privileged. *Mason*, 293 F.Supp.2d at 824. The Court rejected the Respondent's contention that the petitioner had waived his right to assert attorney-client privilege regarding conversations in which the petitioner admitted his criminal responsibility, noting the questionable relevancy of this information to the ineffective assistance claim. *Id.*

Based on this law, the Court finds that Lott has implicitly waived the attorney-client and work product privileges to the extent necessary for the Respondent to defend the actual innocence claim Lott presented in the Successor Petition. The Court now turns to the Respondent's discovery request regarding trial counsel and determines the scope of the waiver.

3. Discovery Requests

The Respondent requests permission to depose Kersey covering the following general topics: (1) whether trial counsel were, as Lott asserts, unaware of the victim's statements regarding McGrath's description of his attacker, (2) statements regarding Lott's alleged innocence relayed to

trial counsel; and, (3) statements regarding Lott's confession to McGrath's murder.

Before subjecting these requests to the "good cause" discovery standard set forth above, the Court first examines the scope of the implicit waiver of Lott's attorney-client privilege. At issue in this litigation is the sole claim of actual innocence Lott raised in the Successor Petition. He asserts that he is innocent of McGrath's murder. He states that, inter alia, the prosecutor's withholding of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), prevented him from properly presenting his actual innocence claim to the state court or previously to this Court.

To defend this claim, the Respondent would be entitled to discover any information tending to undermine Lott's assertion of innocence. Thus, Lott cannot assert privilege to thwart the Respondent's efforts to obtain such information. Moreover, because Lott asserts that he was unable to present his actual innocence claim to any previous court because, inter alia, the prosecutor withheld exculpatory evidence in violation of *Brady*, the Court finds that Lott has waived his right to assert privilege pertaining to his *Brady* claim.

The Court finds that the Respondent has demonstrated good cause to depose counsel Kersey. All three of the general topics the Respondent outlined for Kersey's deposition relate either to Lott's assertion that a *Brady* violation occurred or to his claim of actual innocence. Accordingly, the Court grants the Respondent's request to depose him.

The Respondent next requests permission to obtain testimony and the production of documents from the offices of deceased trial counsel Elmer Guiliani. She asks for discovery concerning three issues: First, she asks that a member of Guiliani's office certify that all files concerning Lott were in

fact transferred to Dale Baich at the Ohio Public Defender's Commission. Second, she requests confirmation from the Guiliani Offices that there are no separate files pertaining to Lott's case remaining in that office. Finally, the Respondent asks that an individual from Guiliani's office, presumably his son, be deposed so that she can question him regarding his father's general discovery practices and his relationship with prosecutor Carmen Marino. This discovery, the Respondent asserts, will assist in ascertaining whether trial counsel knew of the alleged *Brady* evidence.

Lott joins in the Respondent's request for discovery regarding the first two issues. He asserts, however, that any documents recovered by the Guiliani firm must be turned over to him in order to protect the attorney-client privilege. The Court partially agrees with this assertion. To the extent that a custodian of these records recovers any additional documents pertaining to Lott's case, the Respondent can discover only information related to defending Lott's actual innocence and *Brady* claims. Accordingly, the Court grants the Respondent's request to obtain any files or other matter concerning the Lott case, but orders that such custodian submit any such records directly to the Court. The Court will then conduct an in camera inspection of these documents and relinquish to the Respondent any documents responsive to her request.

Finally, Lott objects to the Respondent's third request for discovery, i.e., her request to depose a member of Guiliani's former office to discern his discovery practices and relationship with trial prosecutor Marino. Lott objects to this request on the ground that the Respondent does not identify any person who could provide such discovery. While the Respondent asserts in her Reply that Guiliani's son may be able to fulfill this role, the Court denies this request as overbroad and not sufficiently likely to procure information to factually develop this claim. Accordingly, the

Respondent's request to depose an attorney from Guiliani's firm regarding his former practices and relationship with prosecutor Marino is denied.

B. Deposition and Production of Documents from Detective Hughley

The Respondent next requests permission to depose Detective James Hughley, the police detective who asserted that Lott had confessed to him. She wishes to address three distinct areas during the deposition: (1) she wishes to question Detective Hughley regarding Lott's confession, which Lott now asserts Detective Hughley fabricated; (2) she wants to query Detective Hughley regarding any statements McGrath made to him concerning his attacker; and, (3) she would like to ascertain any other evidence of which Detective Hughley is aware regarding Lott's actual innocence of the crime.

Lott objects to each of these requests, asserting that any pertinent information Detective Hughley may possess already was revealed during pre-trial proceedings. He argues that a deposition of Hughley would only serve to "trash" Lott's character by giving the Court his opinion regarding Lott's involvement in McGrath's murder and other crimes for which Lott was implicated or indicted but never convicted. Br. In Opp., at 16. Alternatively, Lott urges, if the Court is inclined to grant the Respondent's request, it should also grant him permission to question Detective Hughley regarding his knowledge of documents withheld from him in violation of *Brady*.

The Court finds that the Respondent has set forth good cause to depose Detective Hughley. Contrary to Lott's assertions, the Respondent does not wish to depose Detective Hughley regarding who, in his opinion, murdered McGrath. Instead, the Respondent wants the opportunity to rebut Lott's

assertion that Detective Hughley fabricated the confession by asking him questions that might aid the Court in assessing his credibility. Moreover, as stated above, because Lott put his actual innocence of the crime at issue, it is appropriate for the Respondent to question Detective Hughley on any facts related to this assertion. Because this Court is the sole factfinding entity adjudicating Lott's actual innocence claim, Lott's concerns that any attempt by Detective Hughley to "trash" his character will prejudice this proceeding are misplaced. Thus, the Court grants the Respondent's request.

Equally discoverable from detective Hughley is any information he may possess regarding exculpatory information withheld from Lott prior to trial. While Lott does not specify why he believes Detective Hughley would possess such knowledge, any additional information he could provide regarding the *Brady* claim would aid the Court. Lott has set forth good cause to question Detective Hughley regarding his knowledge of *Brady* evidence. The Court grants this request.

C. Deposition of Petitioner Lott

The Respondent next requests permission to depose Lott. She asserts that she is entitled to query Lott on three distinct topics because Lott denies in the verified Successor Petition n6 that he confessed to Detective Hughley and that he killed McGrath. Specifically, she claims the right to question Lott regarding:

1. Lott's knowledge about whether trial counsel were aware of the victim's statements regarding his attacker;

2. Lott's actual innocence of killing McGrath;

3. Lott's actual statements to Detective Hughley.

Discovery Motion, at 5-6. Because Lott has raised these issues in the Successor Petition and bears the burden of proving them, the Respondent asserts her right to this deposition.

> n6 The verification of the Successor Petition is tantamount to testimony asserting the truth of the factual claims contained therein. *Bean v. Calderon*, 166 F.R.D. 452, 455 (E.D. Cal. 1996).

Predictably, Lott disagrees. He reasserts his position that, because of the nature of the actual innocence claim he is raising, i.e., one that is interconnected to his *Brady* claim, he "could prove his case without recourse to anything other than the trial transcript and the hidden *Brady* evidence that rendered that trial constitutionally unfair." Brief in Opp., at 17. While that may have been the case had Lott merely asserted a *Brady* claim in the Successor Petition, Lott's assertion that the *Brady* claim is interconnected to his actual innocence belies his assertion that factual information regarding his innocence of the crime is superfluous. Once again, Lott confuses the standard by which he asserts this Court ultimately must decide his claim—beyond a reasonable doubt—with the ability of the Court to permit factual development of his claim in order to reach an informed decision.

Regardless of Lott's opposition, the Court must determine whether it may permit a respondent to depose a habeas petitioner regarding a claim of actual innocence. The Respondent's and the Court's own independent research yields little authority from which the Court can draw guidance. The little existing authority on this issue makes clear that a habeas court may, with good cause, order the deposition of a habeas petitioner. First, Habeas Rule 6(c) contemplates such an event. It states:

(c) Expenses. If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

R. Governing Section 2254 Cases 6(c). More relevant to this issue than the actual Rule are the Advisory Committee's Notes to that Rule. They state:

Subdivision (c) specifically recognizes the right of the respondent to take the deposition of the petitioner. Although the petitioner could not be called to testify against his will in a criminal trial, it is felt that the nature of the habeas proceeding, along with the safeguards accorded by the Fifth Amendment and the presence of counsel, justify this provision.

R. Governing Section 2254 Cases 6(c) advisory committee's notes. Thus, Rule 6(c) appears to sanction deposing a habeas petitioner subject to the Fifth Amendment right against self-incrimination.

Having determined that a respondent may depose a habeas petitioner, the Court next must address whether a petitioner's right to assert his Fifth Amendment right against self-incrimination, as recognized by the Advisory Committee, could be limited in a habeas proceeding in which a petitioner is asserting his actual innocence of the crime. The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 8, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964), provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *Andresen v. Maryland*, 427 U.S. 463, 470, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976). The Self-Incrimination Clause represents our unwillingness to subject those suspected of a crime to self-

accusation and our desire to require the government to "shoulder the entire load" in obtaining a criminal conviction. *Doe v. United States*, 487 U.S. 201, 212, 101 L. Ed. 2d 184, 108 S. Ct. 2341 (1988)(quoting *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964)). The Fifth Amendment prohibits a court or prosecutor in a criminal trial from drawing an adverse inference from the defendant's assertion of the right against self-incrimination. *Griffin v. California*, 380 U.S. 609, 615, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965).

As stated above, few courts have adjudicated the extent of this Fifth Amendment right regarding an actual innocence claim in a habeas action. In one such case, *Bean v. Calderon*, 166 F.R.D. 452 (E.D. Cal. 1996), the court held that a habeas petitioner who had claimed that his counsel were ineffective was entitled to assert his Fifth Amendment right against self-incrimination during the respondent's deposition of him, but that the habeas court could draw adverse inferences from this assertion. The court first noted that while a habeas proceeding is a civil one, its ability to affect an individual's life and liberty may require a habeas court, at times, to look to criminal law standards. *Id.* at 453-54. Furthermore, the *Bean* court opined that while a habeas petitioner typically is not afforded the constitutional protections of a criminal defendant, a habeas petitioner's success could entitle him or her to a new trial in which prior incriminating statements could be used. *Id.* at 454.

The *Bean* court then noted that, because in a habeas proceeding it is the petitioner, rather than the state, who bears the burden of proof, the right against self-incrimination in pursuing relief may be curtailed. It held:

Petitioner has invoked the court's process to overturn what would otherwise be a final state conviction, and must prove that it should be overturned. It is not at all untoward to hold

that petitioner must establish the facts that would give rise to the overturning, and if he refuses to put forth facts that are within his knowledge, and which are pertinent to the claims that he has made in habeas, an adverse inference may be drawn.

Id. at 455. Thus, the court held that, because the petitioner already had stated in his verified petition that his counsel provided him constitutionally inadequate representation because of their failure to investigate his actual innocence of the crime, the respondent was entitled to query this testimony during a deposition. Thus, while the *Bean* court recognized a habeas petitioner's right against making self-incriminating statements, it limited that right during a federal habeas action by permitting the court to draw an adverse inference from its assertion. Finally, the court found that, if it provided the petitioner the right to assert the Fifth Amendment without adverse inference, then Habeas Rule 6(c)'s provision entitling the respondent to depose the petitioner would be rendered an "idle act." *Id.* at 456.

The Court finds the *Bean* court's reasoning persuasive. To prevail in his Successor Petition, Lott bears the burden of proving that the alleged *Brady* evidence exculpates him and demonstrates his actual innocence. To develop the factual predicate of that assertion, he must be subject to the Respondent's queries regarding his innocence and the circumstances surrounding his conviction. Consequently, the Court finds good cause exists for the Respondent to depose Lott and question him regarding each of the three topics outlined above. Because Lott raised these issues in the verified Successor Petition, the Court must provide the Respondent with an opportunity to oppose them. Accordingly, the Court grants the Respondent's request to depose Lott. As with the *Bean* petitioner, Lott may at any point during the deposition assert his Fifth Amendment right against self-incrimination, thereby protecting his interests in

any subsequent criminal proceedings. In so doing, however, the Court will draw an adverse inference against him.

D. Deposition and Production of Documents from Post-Conviction and Habeas Counsel

The Respondent next requests that the Court grant her permission to depose Lott's post-conviction counsel, Dale Baich, as well as Lott's first federal habeas counsel Randall Porter, n7 and J. Joseph Bodine, Jr. She asserts the necessity to depose Baich so that he may directly answer questions regarding when he received the alleged *Brady* materials and why he elected not to utilize them on post-conviction review. This information, she contends, relates directly to defenses she wishes to assert pursuant to the statute of limitations and procedural default. To date, the Respondent notes, the Court has received no information directly from Baich regarding these issues. n8 The Respondent also wishes to depose Baich regarding conversations he had with trial counsel and what trial counsel received from the prosecution during trial. Finally, the Respondent requests that Baich turn over all copies of materials relevant to the above-identified topics.

> n7 Through counsel, Porter filed a separate Opposition to Motion for Discovery, docket no. 31.

> n8 The only information regarding Baich's decision to withhold police documents from state courts that is part of the current habeas record comes from an affidavit of Randall Porter and an affidavit of Greg Myers.

The Respondent wishes to depose former habeas counsel for similar reasons. She wishes to question them regarding conversations they had with trial counsel and Baich, as well as ascertain why counsel did not pursue an actual innocence claim in the first habeas proceeding. The Respondent also

wishes to obtain the transcript from this Court's disciplinary proceeding against Porter to obtain information related to the statute of limitations, procedural default, and successor habeas defenses.

Lott opposes these requests on several grounds. First, as stated above, he asserts that a deposition of his attorneys would violate the work product doctrine and attorney-client privileges. He argues that the most forthright means of obtaining information about what trial counsel relayed to post-conviction or habeas counsel would be to question trial counsel directly. Additionally, Lott asserts that records he already has supplied to the Court through a Motion to Expand the Record, docket no. 28, contain information regarding when Lott obtained the *Brady* materials. n9 Thus, he maintains, pertinent information related to the Respondent's procedural defenses already are contained in the current habeas record.

> n9 The Court granted this Motion on September 23, 2004, docket no. 40.

While the Court found that Lott has waived the right to assert attorney-client and work product doctrine privileges in regards to deposing trial counsel Kersey, the Respondent's requests to depose Lott's counsel during collateral attack of the conviction present the Court with a closer question. As previously stated, a habeas court's determination regarding whether to disregard a petitioner's assertion of privilege involves balancing the competing interests of the federal courts to fully litigate the habeas claim with the state's interests in maintaining the integrity of state-created privileges. The Court finds that the Respondent's possibility of obtaining some of the information she requests is too speculative to offset the state's interesting in keeping the privileges intact. Accordingly, the Court finds that the Respondent has not established good cause to depose any of

these counsel regarding statements that trial counsel may have made to them regarding the alleged *Brady* material or Lott's actual innocence of the crime. Because the Court already is permitting the Respondent to depose trial counsel on these issues, the Court finds that, permitting the Respondent to question post-conviction and habeas counsel regarding Lott's actual innocence, particularly because those issues were not presented during their respective representations, would be an unnecessary intrusion into these privileges based on the Respondent's mere speculation. Thus, the Court denies these requests and denies the Respondent's request to depose Baich, Porter, or Bodine regarding Lott's *Brady* or actual innocence claims.

Conversely, the Court finds that good cause exists for the Respondent to depose Baich on when he received the alleged *Brady* documents and why he withheld them from the state courts. While Lott is correct that the record contains documents regarding Baich's public records request, it lacks any information directly from Baich regarding his receipt of this information and his ultimate decision to forego its use. Thus, the Respondent will be permitted to question Baich on this issue to develop her statute of limitations and procedural default defenses to Lott's actual innocence claim. The Court will also permit the Respondent to depose Porter regarding his decision not to raise an actual innocence claim in the initial habeas Petition. Permitting this line of questioning could aid the Respondent in developing any successor habeas petition defenses. The Court denies as duplicative the Respondent's request to depose co-counsel Bodine on this issue. Because the Court permits the Respondent to depose Porter, it denies as unnecessary the Respondent's request to subpoena the briefs and transcript of this Court's disciplinary proceeding against Porter to buttress her procedural defenses. n10

n10 The Court notes, moreover, that because these depositions necessarily will be short, they likely can be conducted over the telephone.

E. Records Deposition and Production of Documents from State Public Defender's Office Regarding Trial and Post-Conviction Counsel's Files

The Respondent's next discovery request is to obtain documents from trial and post-conviction counsel's files regarding discovery proceedings with the prosecutor, defense counsel's investigation into Lott's commission of the crime, and trial counsel's discussions with Lott regarding what he told police. She seeks to recover documents, "including, but not limited to, trial counsel's notes regarding [the above] topics, reports from their investigator Craig Briss, reports from Susan Shorr, Martha Jacoby, Dr. Bertschinger, and Dr. Eisenberg if they include any information on Mr. Lott's guilt or statements to them about the offense that the State alleged that Lott committed against Mr. McGrath, and documents relating to a polygraph examination that may have been administered to Mr. Lott." Motion, at 12.

Lott objects to these requests, claiming that the attorney-client and work product doctrine privileges render any responsive materials undiscoverable. Lott specifically objects to the Respondent's request to discover documents concerning the polygraph test because courts typically deem such tests unreliable. The Respondent counters this objection by observing that the reliability of polygraph tests is relevant only to the weight the Court would give such information when rendering its decision, not whether it is subject to discovery.

The Court finds that good cause exists for the Respondent to obtain trial counsel's and post-conviction counsel's files from the Ohio Public Defender. As stated above, Lott has waived

his right to assert attorney-client and work product doctrine privileges to the extent necessary for the Respondent to defend Lott's actual innocence and *Brady* claims. Thus, the Court finds that any information pertaining to Lott's actual innocence and *Brady* claims are discoverable by the Respondent. The Ohio Public Defender shall review the files it has in its possession regarding Lott's case for any responsive documents and shall forward them to the Respondent. The Ohio Public Defender may not assert attorney-client privilege as grounds for withholding any documents related to Lott's culpability in McGrath's murder. The Ohio Public Defender has sixty (60) days from the date of this Order in which to supply the Respondent with any responsive documents.

Recognizing its unreliability, the Court grants the Respondent's motion to discover any documents regarding a polygraph test Lott took prior to trial. While the Court will consider the credibility (or lack thereof) of any test results that this discovery request yields in deciding Lott's claim, it cannot exclude these documents from discovery because they may shed light on whether Lott is actually innocent of McGrath's murder. n11 Thus, the Court finds that good cause exists to allow the discovery of any polygraph test documents.

> n11 Moreover, it has been this Court's policy to permit broad discovery in its habeas cases for purposes of judicial economy and appellate review even if it later decides to disregard such discovery when rendering its opinion.

F. Deposition and Production of Documents from Members of the Ohio Parole Board who interviewed Lott

The Respondent next seeks to depose members of the Ohio Parole Board who heard Lott testify that he did not murder

McGrath. Given the fact that the Court is permitting the Respondent to question Lott directly on this issue, the Court finds it unnecessary to depose these individuals. Moreover, the Court already has denied Lott's Motion to delete clemency documents from the Return of Writ, marginal entry order, Oct. 14, 2004. Thus, if the Court deems it necessary, it has the means to review impressions and recommendations of the Parole Board. Accordingly, the Court denies the Respondent's request to depose its members.

G. Depositions of Patrolman Messina, Patrolman Mahovlich, Hospital Personnel, and Trial Team

The Respondent requests the Court's permission to depose former East Cleveland Patrolman Messina, who first attended to McGrath upon discovering him badly burned in his home. Messina also was first to hear McGrath's description of his assailant. Lott opposes this request, asserting that "whatever he has or had to offer regarding this case is part of the record," Brief in Opp., at 25, but cites to no place in the record where Messina reveals what McGrath told him regarding his attacker. n12 Because Lott has made McGrath's description of his attacker a central point in his actual innocence claim, the Court finds good cause to depose Messina regarding what, if anything, McGrath initially revealed regarding this description.

> n12 Although Messina testified during trial, he did not testify about McGrath's description of his attacker.

Conversely, the Respondent has not established good cause to depose former Cleveland Detective Peter Mahovlich. The Respondent indicates in the Motion that, upon interviewing Lott, Mahovlich recorded that Lott denied knowing McGrath. The Court cannot discern how, after the passage of over fifteen years, Mahovlich would be better able to relay Lott's statements regarding McGrath than when he first heard them.

Moreover, because Mahovlich's police report is already contained in the record, the Court finds further discovery on this issue is unneeded.

The Court denies the Respondent's requests to depose hospital personnel in contact with McGrath and request to depose members of Lott's trial team on similar grounds. The Respondent does not state with specificity which hospital personnel were in contact with McGrath or whether there is any indication that they have relevant information to convey. Thus, the request is denied as speculative and overbroad. Finally, the Court denies the Respondent's request to depose Lott's trial experts. Given the passage of time, the Respondent is hard pressed to assert that their independent recollection of encounters with Lott would be more accurate than the reports they prepared at the time of trial. Because the Court already has granted the Respondent's request to review trial counsel's files, which presumably contains these experts' reports, the Court finds no good cause exists to depose these members of Lott's trial team.

H. Deposition of Art McCoy

The Respondent's final discovery request is to depose Art McCoy, McGrath's barber. She asserts the necessity for deposing McCoy because of the alleged exculpatory statements that McGrath made, indicating that he believed his assailant and he patronized the same barber. Lott does not oppose this request. The Court finds that the Respondent has established good cause to depose McCoy as he is central to Lott's claim of misidentification. Thus, the Court grants this request as relevant and unopposed.

II. Motion for Evidentiary Hearing

In his motion for an evidentiary hearing, Lott addresses exclusively the issue of whether he has failed to develop his

claims in state court pursuant to 28 U.S.C. § 2254(e)(2). At no point does he provide the Court with what facts he proposes to develop or how they would further elucidate the actual innocence claim or *Brady* assertion he raises in the Successor Petition. *See McAdoo v. Elo*, 365 F.3d 487, 500 (6th Cir. 2004)(holding federal habeas hearing warranted only when petitioner presents specific facts related to petition that would, if fully developed, lead to habeas relief). Moreover, because of the Court's decision to grant the Respondent broad discovery in this action, the parties may deem an evidentiary hearing unnecessary upon its completion. The Court prefers to address the need for an evidentiary hearing after further developing the record through discovery. Accordingly, the Court denies Lott's Motion for an Evidentiary Hearing without prejudice.

III. Motion to Expand the Record

Lott seeks to expand the record to include a letter from the City of East Cleveland to attorney Dale Baich recounting the delivery of public records to Baich. He also seeks the inclusion of an affidavit of James Kersey, Lott's trial counsel. In this affidavit, Kersey states that the prosecutor never disclosed the alleged *Brady* information to him prior to or during trial. The Respondent opposes the admission of the affidavit, asserting that Lott failed to present it to the state courts. Thus, she claims, it fails to meet the due diligence requirement set forth in 28 U.S.C. § 2254(e)(2). That statute states:

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold a hearing on the claim unless the applicant shows that—
(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Although the statute enunciates the standards by which a habeas court may grant an evidentiary hearing, the United States Supreme Court recently held that this same standard applies when a habeas petitioner wishes to expand the record. *See Holland v. Jackson*, 542 U.S. 649, 159 L. Ed. 2d 683, 124 S.Ct. 2736, 2738 (2004)(holding restrictions set forth in § 2254(e)(2) apply when prisoner seeks habeas relief based on the introduction of new evidence without an evidentiary hearing).

The Court finds the Respondent's objection to the affidavit to be well-taken. Lott neither alleged in his Motion that he presented the Kersey affidavit to the state courts nor filed a reply brief on this issue. Thus, the Court must presume that this affidavit was not presented at any juncture of his state court appeals. Moreover, the Court finds that, because it has granted the Respondent's request to depose Kersey, the affidavit would merely duplicate what will likely be his deposition testimony. Consequently, the Court denies this aspect of the Motion. The Court grants, as unopposed, Lott's request to expand the record to include the letter from the City of East Cleveland.

IV. Conclusion

For the foregoing reasons, the Court grants in part and denies in part the Respondent's Motion for Discovery, docket no. 19. Pursuant to Rule 6(c) of the Rules Governing Habeas Corpus Cases Under 2254, the Respondent shall pay the travel and subsistence expenses and attorney's fees at a rate of one hundred sixty (160) dollars per hour to Lott's habeas counsel for the taking of Lott's deposition. The Respondent shall have ninety (90) days from the date of this Order in which to complete all discovery. If discovery is completed prior to that time, the parties shall notify the Court.

The Court denies without prejudice Lott's Motion for an Evidentiary Hearing, docket no. 16. When discovery is complete, if neither party moves for an evidentiary hearing within fourteen (14) calendar days thereof, Lott shall brief and file with the Court within forty (40) days of the close of discovery any post-discovery arguments regarding the procedural default status and merits of the actual innocence claim set forth in the Successor Petition. The Respondent shall file its responsive brief within twenty (20) days thereafter.

The Court grants in part and denies in part Lott's Motion to Expand the Record, docket no. 27.

IT IS SO ORDERED.
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

DATED: March 29, 2005

APPENDIX C

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001
William K. Suter
Clerk of the Court
(202) 479-3011
November 28, 2005

Mr. Douglas R. Cole
State Solicitor General
30 East Broad St.
17th Floor
Columbus, OH 43215

Re: Marc Houk, Warden
v. Gregory Lott
Application No. 05A463

Dear Mr. Cole:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on November 28, 2005 extended the time to and including January 27, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ CLAYTON HIGGINS
Clayton Higgins
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011
NOTIFICATION LIST

Mr. Douglas R. Cole
State Solicitor General
30 East Broad Street
17th Floor
Columbus, OH 43215

Clerk
United States Court of Appeals for the Sixth Circ
524 Potter Stewart Courthouse
100 East Fifth Street
Cincinnati, OH 45202

APPENDIX D

In re: GREGORY LOTT,
Appellant

No. 05-3532

United States Court of Appeals
for the Sixth Circuit

139 Fed. Appx. 658; 2005 U.S. App. Lexis 12280

June 22, 2005, Filed

Before: Boggs, Chief Judge; Merritt and Cole, Circuit Judges

ORDER

Gregory Lott has petitioned this Court for mandamus relief from an order that would require discovery of material that he claims is protected by the attorney-client and work product privileges. Lott was convicted and sentenced to death for the 1986 brutal murder of John McGrath in East Cleveland, Ohio. He is currently litigating his second habeas corpus proceeding in the Northern District of Ohio. *See In re Lott*, 366 F.3d 431, 434 (6th Cir. 2004)(authorizing Lott to file a second petition). In this petition, Lott claims that the prosecution withheld vital exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). In order for Lott to bring this second petition, he must establish that but for this constitutional error, no reasonable fact finder would have found him guilty of the murder. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). The District Court has apparently construed Lott's pleadings as presenting a claim of actual innocence of the underlying crime and has found this actual innocence claim relevant to the habeas proceeding. As such, the District Court

determined that Lott injected his factual guilt or innocence of the murder into the proceedings.

Surprisingly, the District Court further ruled that through his assertion of innocence, Lott has "implicitly waived the attorney-client and work product privileges to the extent necessary for the Respondent to defend the actual innocence." Lott's Petition for Mandamus, Exhibit 1 (Judge O'Malley's Discovery Order at 9-11). In accordance with this ruling, the court has authorized the deposition of and production of documents from Lott's trial counsel. Specifically, the court ruled that the warden could inquire into any statements Lott made to his counsel regarding his innocence or guilt and any statements made to counsel concerning whether he confessed the murder to the police. n1

> n1 'Lott's objections to the District Court's discovery order are not strictly limited to claims of attorney-client and work product privilege. Indeed, he makes additional arguments concerning the scope of the warden's available discovery. As the scope of discovery and admissibility is not a proper issue for interlocutory appeal, we do not address this aspect of the order. Instead, our review is limited to the District Court's determination that these important privileges have been waived.

While discovery orders are not typically subject to interlocutory appellate review, courts of appeals have utilized mandamus review when important interests such as privilege are at issue. *See*, e.g., *In re Regents of University of California*, 101 F.3d 1386 (Fed. Cir. 1996), cert. denied 520 U.S. 1193, 137 L. Ed. 2d 695, 117 S. Ct. 1484; *In re Bieter*, 16 F.3d 929, 931-33 (8th Cir. 1994); *Chase Manhattan Bank, N.A. v. Turner & Newall*, PLC, 964 F.2d 159, 163 (2d Cir. 1992). Two courts of appeals, confronting discovery orders issued over claims of attorney-client or work product

privilege, have taken a different approach and found these rulings immediately appealable under the collateral order doctrine. *See In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997); *United States v. Philip Morris*, 354 U.S. App. D.C. 171, 314 F.3d 612, 617 (D.C. Cir. 2003). Due to the importance of the interest asserted, the novelty of the district court's waiver determination, and Lott's likelihood of success, this Court grants an immediate stay of discovery pending further consideration by this Court of the issues raised by Lott.

In determining whether to grant a stay, this Court considers (1) the likelihood that the party seeking the stay will prevail on the merits, (2) the likelihood that the moving party will be irreparably harmed absent a stay, (3) the prospect that others will be harmed if the court grants the stay, and (4) the public interest in granting the stay. *Grutter v. Bollinger*, 247 F.3d 631, 632, (6th Cir. 2001); *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

Regardless of the jurisdictional basis and the concomitant standard of review, it is likely that Lott will succeed in blocking the execution of the District Court's discovery order. The question at issue is whether the attorney-client and work product privileges have been waived. To be certain, "the [attorney-client] privilege is not an inviolable seal upon the attorney's lips." *Johnson v. Alabama*, 256 F.3d 1156, 1178-79 (11th Cir. 2001). Nor is the protection typically afforded attorney work product inviolable. A habeas petitioner like any other litigant may waive these privileges. Here, this Court must review the District Court's determination that Lott's assertion of actual innocence effected a waiver of the attorney-client and work product privileges.

Generally, "the 'attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties. In addition, a client may waive the privilege by conduct which implies a waiver of the privilege or a consent to disclosure.'" *In re Columbia /HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 294 (6th Cir. 2002)(internal citations omitted). The work-product privilege may also be subject to implied waiver. *In re Perrigo Co.*, 128 F.3d 430, 445 (6th Cir. 1997). For example, "the affirmative use of the work product to advance the claimant's interests" would implicitly waive any privilege. *Id.*

In the habeas context, courts have found implied waiver of the attorney-client privilege when the petitioner "injects into [the] litigation an issue that requires testimony from its attorneys or testimony concerning the reasonableness of its attorneys' conduct." *Johnson*, 256 F.3d 1156, 1178 (11th Cir. 2001). But, this implied waiver has typically been the result of a petitioner's assertion of his own counsel's ineffectiveness. *See id.* ("By alleging that his attorneys provided ineffective assistance of counsel in their choice of a defense strategy, [the petitioner] put at issue-and thereby waived-any privilege that might apply to the contents of his conversations with those attorneys to the extent those conversations bore on his attorneys' strategic choices."); *See also Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003); *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) ("When a client calls into public question the competence of his attorney, the privilege is waived.").

Implied waivers are consistently construed narrowly. Courts "must impose a waiver no broader than needed to ensure the fairness of the proceedings before it." *Bittaker*, 331 F.3d at 720. In a different context, the Court of Appeals for the Third Circuit found that a "party waives the privilege only when he or she "has made the decision and taken the affirmative step

in the litigation to place the advice of the attorney in issue." *U.S. Fire Insurance Co. v. Asbestospray, Inc.*, 182 F.3d 201, 212 (3d Cir. 1999); *See also Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 (7th Cir. 1995). ("The attorney-client privilege is generally waived when the client asserts claims or defenses that put his attorney's advice at issue in the litigation.").

To be sure, litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case. "The attorney-client privilege cannot at once be used as a shield and a sword." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). But, while the sword stays sheathed, the privilege stands.

In this case, the District Court applies implied waiver in a completely new context with no citation to any legal authority. Rather than finding that Lott had put his attorney's performance or strategic decisions at issue and determining that he took the affirmative action to waive the privilege, the court finds waiver in Lott's assertion that the police invented the confession and in his assertion that he is innocent. Neither of Lott's assertions relate to what his attorney knew or did in this case. Instead, they are assertions about Lott's actions, *i.e.*, whether he killed McGrath and whether he confessed to the killing. We have not been able to discover a single case where a court has found that implied waiver applied in a similar fashion.

The link between the waived privilege and the actual communications injected into the litigation by the petitioner was noted in another recent case from the northern district. *See Mason v. Mitchell*, 293 F. Supp.2d 819, (N.D. Ohio 2003). In Mason, the district court found that the petitioner implicitly waived attorney-client privilege by putting his attorney's performance at issue, but was careful to note that "the waiver in habeas cases should be limited to the extent

necessary to litigate a petitioner's ineffective assistance of counsel claims." Mason, 293 F. Supp.2d at 823 (citing *Bittaker*, 331 F.3d at 722). As such, the Mason court rejected the warden's request "to question the Petitioner about what he told his trial counsel regarding his involvement in the crime." *Id.* Also, in Mason, while the district court found the petitioner had implicitly waived the work product privilege regarding a psychiatric examination, that waiver did not extended to the privilege surrounding any inculpatory statements the Petitioner may have made to the psychiatrist. *Id.* at 825.

The only authority that the District Court cites in support of this novel finding of implied waiver is an unreported order from the northern district. Lott's Petition for Mandamus, Exhibit 1, Discovery Order at 9-10 (quoting *Phillips v. Bradshaw*, No. 5:03 CV 0875 at 2-3 (N.D. Ohio Apr. 30, 2004)(order granting *in camera* inspection of documents)). Moreover, the cited order does not address the injection of actual innocence as an implied waiver of the privilege. Instead, that order appears to address the more typical implied waiver that is triggered by an ineffective assistance of counsel claim. *See id.* at 9 (quoting *Phillips*)("Although the privilege typically is the client's to assert or waive, courts have recognized that a client implicitly waives the attorney-client privilege by putting the attorney's performance at issue during subsequent litigation."). Likewise, the warden, responding in opposition to the stay of discovery, cites no authority and provides only scant reasoning for why the attorney-client privilege has been waived:

The only area in which Lott would assert harm then is discovery for which he would claim attorney-client and work-product privileges, but there the question has to be whether Lott can assert harm in the discovery of documents concerning a topic that Lott directly put in issue. If there is harm permitting discovery into otherwise privileged material,

Lott has brought that harm onto himself. He simply cannot argue that he is innocent and expect the Court to shield him from disclosing information that shows his guilt.

Respondent's Opposition to Stay at 4. Given that the district court's order appears to be an unsupported departure from the law of implied waiver, it is likely that relief will be granted by this Court.

In considering whether or not to issue a stay, the petitioner's likelihood of success on the merits is only one factor. This Court should also consider (2) the likelihood that the moving party will be irreparably harmed absent a stay, (3) the prospect that others will be harmed if the court grants the stay, and (4) the public interest in granting the stay.

This Court has noted, in a similar civil context, the inherent harmfulness resulting from the discovery of privileged communications: "We find, as have several courts, that forced disclosure of privileged material may bring about irreparable harm." *In re Perrigo*, 128 F.3d at 437. In a similar case, an appellate court found that the breach of privilege alone constituted irreparable harm: "Although [the party] 'has not asserted any specific irreparable injury that would occur' if it produced the [document], the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party is clear enough." *United States v. Philip Morris, Inc.*, 354 U.S. App. D.C. 171, 314 F.3d 612, 621-22 (D.C. Cir. 2003); *See also In re Ford Motor Co.*, 110 F.3d 954, 962-64 (3d Cir. 1997)("Appeal after final judgment cannot remedy the breach in confidentiality occasioned by erroneous disclosure of protected materials. . . . The cat is already out of the bag. . . . There is no way to unscramble the egg scrambled by the disclosure . . . .").

The warden's strongest argument concerns the third factor: the prospect that others will be harmed by the issuance of a stay. Any stay, even a short stay, could arguably injure the interests of the State of Ohio. The State has expressed that "the State has waited eighteen years to carry out the death sentence," and that "every day [the] stay of execution remains in place is an injury to the State of Ohio." Certainly, a stay of discovery would further prolong review of what very well may be a just sentence imposed almost two decades ago. The State certainly has an interest in the efficient use of judicial resources and in achieving final resolution of criminal cases. This factor does weigh against the issuance of a stay.

Finally, this Court has noted that the scope of the attorney-client privilege is a matter that is inherently linked to the "public end" of adequate legal representation:

Attorney-client privilege is a matter of common law right, "the oldest of the privileges for confidential communication known to the common law." It is not a creature of contract, arranged between parties to suit the whim of the moment.

In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 303 (6th Cir. 2002)(quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)(internal citations omitted). This public interest requires that the courts endeavor to clearly delineate the creation, scope, and dissolution of these essential privileges:

If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to apply the privilege in ways that are predictable and certain. "An uncertain privilege—or one which purports to be certain, but rests in

widely varying applications by the courts—is little better than no privilege."

Rhone-Poulenc Rorer Inc. v. Home Indent. Co., 32 F.3d 851, 862-863 (3d Cir. 1994) (quoting *In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987)).

Given the likelihood that relief will be granted, the irreparable harm resulting to the petitioner if privileged information is disclosed, and the important public interest at stake, this Court finds the issuance of a stay appropriate. It is difficult to see how the harm that would be caused to the State by a stay could outweigh the important interests of Lott, the legal system, and the public interest in resolving this question. To the extent the District Court's order permits the discovery of material otherwise protected by the attorney-client or work product privileges, that order is stayed pending further consideration of Lott's request for relief.

The parties may submit further briefs as to (1) the jurisdictional authority of this Court to decide the issues raised by Lott and (2) the extent to which the claims raised in Lott's second petition implicitly waive the protections afforded by the attorney-client and work product privileges. Such briefs should be filed by July 18, 2005. The Court will then issue an opinion on the merits.

Accordingly, a stay is issued. The petitioner during discovery proceedings shall not be required to waive the attorney/client privilege or the work product privilege pending further orders of this Court.

DISSENT

Boggs, Chief Judge, dissenting. The court orders a stay to any discovery that would otherwise be barred by the attorney-client or work product privileges until we are able to

consider Lott's request for relief. Because it does so without sufficiently close scrutiny to the form of relief Lott requests, which is interlocutory mandamus relief from a discovery order, I believe it has incorrectly evaluated not only Lott's likelihood of success, but also the other factors that affect our decision to grant a stay. Though these reasons would suffice to motivate my dissent, I further disagree with the court's suggestion that a habeas petitioner asserting actual innocence does not waive attorney-client privilege. For these reasons, I respectfully dissent.

Lott's motion for a stay of proceedings cannot be divorced from the relief he ultimately seeks. The court correctly identifies the four factors relevant to the granting of a stay, which are (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Slip Op. at 3; *Grutter v. Bollinger*, 247 F.3d 631, 632 (6th Cir. 2001)(citing *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *See also Hilton v. Braunskill*, 481 U.S. 770, 776, 95 L. Ed. 2d 724, 107 S. Ct. 2113 (1987)(identifying these four factors). However, Lott is not before this court on an appeal from the resolution of a petition for writ of habeas corpus. He is instead before us on a petition for mandamus relief, which "is an extraordinary remedy, only infrequently utilized by this court." *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997). As such, we cannot examine Lott's motion for a stay only on the substantive legal question involved, though, were we to, I would still disagree. Rather, our review must evaluate these factors in light of Lott's request of interlocutory relief.

Whether Lott should receive a writ of mandamus turns on a variety of factors beyond simply whether we ultimately find merit in Lott's legal position. *See ibid.* These factors include:

(1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.

(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.)

(3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.

Ibid, (quoting *In re Chimenti*, 79 F.3d 534, 540 (6th Cir. 1996)). In deciding whether or not to grant the writ, we balance the factors. Ibid, (quoting *Chimenti*, 79 F.3d at 540). This is necessary because "'rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable.'" *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984)(quoting *Bauman v. United States Dist. Court*, 557 F.2d 650 655 (9th Cir. 1977)). Indeed, this court has observed that factors (4) and (5) are "to some degree contradictory." *In re Parker*, 49 F.3d 204, 211 (6th Cir. 1995). My disagreement with the majority begins with, but is not limited to, its failure to adequately consider these factors in evaluating whether to grant a stay.

While I believe the question of whether a claim of actual innocence waives attorney-client privilege is a new and important issue, I cannot agree that direct appeal will not offer Lott an adequate forum in which to adjudicate it. More to the point, I do not believe that denying Lott's mandamus

petition, but of course leaving him his standard course of appeals should that become desirable to him, will prejudice Lott "in a way not correctable on appeal." *Ibid.* In *Perrigo*, this court recognized that discovery-based violations of attorney-client privilege "may bring about irreparable harm." *Id.* at 437 (emphasis added). But that cannot mean that any discovery order that impinges on the privilege is automatically grounds for mandamus relief. *See id.* at 435 & 437 (emphasizing our court's "flexible" approach to mandamus review). Instead, the risk of irreparable harm turns on the circumstances. *See id.* at 437 (discussing particular problems faced in that case by a corporation asserting attorney-client privilege).

The circumstances of this case convince me that mandamus relief is not warranted. Petitioner's case is very different from the typical case in which mandamus relief is granted for abusive discovery orders: a complex commercial litigation that is in its beginning stages. This difference matters, not because the harm facing Lott is any less (quite the opposite), but because it impacts this court's ability to remedy that harm on appeal. In the conventional circumstance of commercial litigation, the aggrieved party reasonably fears that losing attorney-client privilege opens a Pandora's box of wrongly gained evidence and accompanying legal theories. An appellate court is thus faced with the probability that a comprehensive case will emerge on appeal from which "tainted" evidence and theories cannot be separated from those legitimately developed. *See United States v. Philip Morris, Inc.*, 354 U.S. App. D.C. 171, 314 F.3d 612, 619 (D.C. Cir. 2003)("It would be impossible for a court to sort out and redress the harm caused by the incorrect disclosure."). As one of our sister circuits has accurately, if colorfully, put it, "there is no way to unscramble the egg scrambled by disclosure." *In re Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997).

That concern is not nearly as prevalent in this case. Here, the parties have been litigating against each other for nearly twenty years throughout the state and federal courts. The issues are clear. Thus, the state's attorneys are unlikely to use whatever they find to pursue new avenues of evidence, adopt new legal positions, or the like. Instead, they hope to extract evidence readily identifiable as stemming from otherwise privileged communications: that Lott admitted to his lawyers either that he had committed the murder or that he confessed to police and that his lawyers were aware of the victim's description of his attacker. They seek to extract this evidence for one reason only: to convince the district court that Lott cannot make a claim of factual innocence. Rather than a mix of legal theories that will be difficult to unravel, this court is faced with one legal theory supported by evidence that can be easily separable into that which is potentially privileged and that which is not. Thus, there is little reason to believe that we could not remedy any error, if indeed there were to be error, on direct appeal, just as we do with other evidentiary issues.

For similar reasons, I also evaluate the second factor differently than the court. The above reasoning makes me doubt that Lott will be "irreparably harmed" should we deny the stay. *Grutter*, 247 F.3d at 632 (emphasis added). Because I disagree with the majority that, in this case, the disclosure of privileged documents could not be remedied on appeal, I also believe that our future substantive adjudication of Lott's petition for mandamus relief can remedy any harm this court concludes he has suffered. n2 Thus, the present circumstance is not a case where the harm facing petitioner "cannot be undone." *Id.* at 633.

> n2 Indeed, should this court decide that Lott has not implicitly waived the attorney-client privilege as to his actual innocence, we could file an opinion on the

merits before the district court considers the evidence at issue.

Of greater importance is my disagreement with the court concerning the fourth and final factor: whether the public interest favors granting the stay. *Ibid.* The majority relies on the general public interest on a reliable and uniform attorney-client privilege. *See* Slip Op. at 8; *See also Rhone-Poulenc Rorer Inc. v. Home Indent. Co.*, 32 F.3d 851, 862-63 (3d Cir. 1994). I do not necessarily dispute that the public has such an interest. I question, however, whether that interest is impacted by the grant or denial of this stay, which is only effective for the duration of our consideration of Lott's petition for mandamus relief. While the public may have some interest in our eventual resolution of this case and its impact on the contours of the attorney-client privilege, that interest is remote from its interest in one stay affecting one litigant in a unique predicament.

Instead, I would find the public's interest, that of the people of Ohio, to be more closely aligned with the State of Ohio's interests than those of petitioner. The State's interests in finality and efficient uses of its judicial resources, see Slip Op. at 8, are also the people's interest. Their tax dollars comprise the State's judicial resources. The public also "'has a vital interest in the fair and prompt conclusion of habeas corpus petitions in federal courts, particularly when they involve a serious crime prosecuted by one of the states.'" *Parker*, 49 F.3d at 208 (quoting *Spann v. Martin*, 963 F.2d 663, 673 (4th Cir. 1992)).

Therefore, I would deny the stay on the basis that all four factors counsel against its issuance. To summarize: as the court agrees, the State has an interest in prompt resolution of this case. At this stage in the litigation, the public's interest seems to me to be squarely aligned with that of the State of

Ohio. While Lott may be injured by the results of this discovery order, I cannot say that the harm will be irreparable because it seems this issue can be resolved via the normal appeals process. For that same reason, I believe Lott cannot show a likelihood of success on the merits of his petition for mandamus, the only issue currently before us, regardless of whether this court disagrees with the district court's legal conclusion that an assertion of actual innocence waives attorney-client privilege. I would therefore deny the stay for the above-mentioned reasons.

However, especially in light of the majority's arguments to the contrary, I wish to express my respectful disagreement with its suggestion that a habeas petitioner's assertion of actual innocence, when used to argue for the consideration of a second habeas petition, does not implicitly waive the petitioner's attorney-client privilege as to that issue. To begin with, the deficiency with the district court's position cannot be that there is no direct authority to support it. If so, then the same criticism can be levied against the court's current order. Neither the majority nor I can find authority that directly addresses the question at issue: whether the assertion of a claim of actual innocence waives the attorney-client privilege. The novelty of the district court's position is little indication that it is incorrect. n3

> n3 Thus, it is also no reason to disagree with the district court's reasoning that habeas courts have generally applied an implied waiver of attorney-client privilege when the petitioner asserts ineffective assistance of counsel. The issue is whether that principle has application in this context.

I do not disagree with the court that implied waivers are justified on the basis of "ensuring the fairness of the proceedings before it." *See* Slip Op. at 4 (quoting *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003)(en banc)).

However, as our sister circuit made clear in *Bittaker*, the waiver should be tailored narrowly "so as to be fair to the opposing side." *Ibid.* This requires a waiver "closely tailored . . . to the needs of the opposing party in litigating the claim in question." *Ibid.* In *Bittaker*, that claim was an ineffective assistance of counsel claim and our sister circuit reasonably limited the scope of the petitioner's waiver to matters relating to his counsel's ineffectiveness.

Here, the claim is one of actual innocence because petitioner seeks to file a successive habeas petition. *Schlup v. Delo*, 513 U.S. 298, 327, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995). Actual innocence is "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). The inquiry is then into whether Lott in fact committed the murder, not whether the state could meet its burden of proof that Lott committed the murder. As the Supreme Court decided in *Schlup*, this means that "the district court is not bound by the rules of admissibility that would govern at trial." 513 U.S. at 327. The district court's determination can be based on "relevant evidence that was either excluded or unavailable at trial." *Id.* at 327-28. What Lott said to his trial counsel about the crime is certainly relevant. It could never have been admitted at trial because of the attorney-client privilege. But, on my reading, *Schlup* indicates that the admissibility of the evidence at a regular trial is irrelevant.

Moreover, as the Ninth Circuit recognized in *Bittaker*, the federal system has interests in the adjudication of habeas petitions that are distinct from the state's interests. 331 F.3d at 721-22. Our sister circuit admitted that, at least hypothetically, the attorney-client privilege "might have to yield" to a particularly important federal interest. *Id.* at 722. While it could "conceive of no federal interest in enlarging the scope of the waiver beyond what is needed to litigate the claim of ineffective assistance of counsel," *ibid.*, the Ninth

Circuit was not faced with a claim of actual innocence. Actual innocence serves as an exception for otherwise procedurally defaulted claims on the basis that it is a fundamental miscarriage of justice to incarcerate the "entirely innocent." *Schlup*, 513 U.S. at 325. The federal system has an interest in limiting this exception to "the 'extraordinary case'" *id.* at 321 (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)), that is applied for "those who [are] truly deserving," Ib*id.* To determine if Lott is truly deserving, i.e., that he is actually innocent, I am inclined to believe the federal district court has a right to examine all of the relevant evidence.

Therefore, I believe that Lott cannot show a likelihood of success on the merits because, regardless of whether we review the district court's decision now or on direct appeal, I am inclined to believe that it did not err. However, granting a stay in this case requires more than disagreeing with the district court's conclusion about the scope of implied waiver. To grant the stay, one must assert that Lott will likely succeed in his petition for mandamus relief, which may not happen for reasons other than the implied waiver issue, and that at least some of the other factors favor granting a stay until we adjudicate his petition for mandamus. For the reasons stated above, I believe all these factors favor respondent and would accordingly deny the stay.

APPENDIX E

In re: Gregory Lott, Movant

No. 04-3462

United States Court of Appeals
for the Sixth Circuit

366 F.3d 431

April 22, 2004, Filed

Before: Boggs, Chief Judge; Merritt and Cole, Circuit Judges. Boggs, Chief Judge, dissenting.

ORDER AUTHORIZING THE DISTRICT COURT TO CONSIDER SECOND APPLICATION FOR A BRADY, ACTUAL INNOCENCE, GATEWAY CLAIM

The petitioner, Lott, scheduled to be executed April 27, 2004, in Ohio, has applied for an Order under 28 U.S.C. § 2244(b) (pertaining to "second or successive habeas corpus" petitions), directing the district court to consider his actual innocence claim based on evidence withheld in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). He has made the requisite "prima facie showing" under 28 U.S.C. § 2244(b)(3)(C). The application is granted and the execution stayed pending adjudication of the claim in the district court. The district court is authorized to consider the application.

The *Brady* claim (not tied to the actual innocence aspect of the claim) was presented in Lott's first federal habeas petition, but we ruled that the claim was procedurally barred and did not reach the constitutional merits of the claim. *Lott v. Coyle*, 261 F.3d 594, 619 (6th Cir. 2001) ("Lott never

raised in state court the specific objection he raises today, and thus we are foreclosed from reviewing it"). We interpreted Ohio state law to create an adequate and independent state ground precluding the federal court from reaching the claim. *Id.* at 617-19. As to the "actual innocence" or "miscarriage of justice" aspect of the claim, we concluded that "since the issue may now be pending in state court and has not been fully briefed before us, we reach no final conclusion. . . ." *Id.* at 619. Thus, no federal court has decided the constitutional merits of the petitioner's *Brady* claim or his actual innocence claim.

After our opinion, the Ohio courts did in fact reach the *Brady* claim on the merits based on a second petition for post-conviction relief filed in state court. *State v. Lott*, 2002 Ohio 2752, 2002 Ohio App. Lexis 2669, 2002 WL 1255579 (Ohio Ct. App. 2002). The state court fully adjudicated the constitutional merits of the *Brady* claim, discussing at length the facts on the merits and deciding the merits against the petitioner.

Thus, this current application for a second federal petition is, if granted, the first time in a federal court that the "factual predicate" for the constitutional claim would be recognized and adjudicated. Although the "factual predicate" for the claim was discovered prior to the adoption of AEDPA, when new stringent requirements were first imposed in death cases, this is the first time since the adoption of AEDPA that a federal court could consider the merits of the constitutional claim. It is not the fault of Lott or his counsel that this is the first time since AEDPA's adoption that a federal court could consider the claim on the merits. This means, we believe, that the second petition should be authorized if the petitioner in his application makes simply a "prima facie showing" that the facts underlying the claim "if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for

constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii).

A "prima facie showing," as Judge Posner pointed out for the Seventh Circuit, is not a difficult standard to meet:

By "prima facie showing" we understand (without guidance in the statutory language or history or case law) simply a sufficient showing of possible merit to warrant a fuller exploration by the district court. All that we usually have before us in ruling on such an application, which we must do under a tight deadline (see 28 U.S.C. § 2244(b)(3)(D)), is the application itself and documents required to be attached to it, consisting of the previous motions and opinions in the case.

Bennett v. United States, 119 F.3d 468, 469 (7th Cir. 1997). "Prima facie" in this context means simply sufficient allegations of fact together with some documentation that would "warrant a fuller exploration in the district court." Those allegations of fact, together with documentation, are clearly presented in the application before us. Judge Posner's "tight deadline" point is further reinforced by subsection (b)(3)(E), which states that "the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." Congress has emphasized the need for quick action by the court without further review.

We conclude that this lenient prima facie standard is met and that the matter should be adjudicated. Lott has made a prima facie showing through documents that the prosecutor of Lott's case fraudulently failed to disclose at trial that the murder victim, before dying, identified a person with a different skin color from Lott as his assailant. The petitioner Lott has also made a prima facie showing that the victim

identified his assailant as someone whom he had seen at his local barber shop and that the prosecutor at trial fraudulently refused to reveal this fact as well. In addition, the petitioner Lott has made a prima facie showing that the prosecutor at trial falsely stated to the court that the instrumentality that caused the victim's death—namely, kerosene lamp fluid—was not present in the victim's house and had to be brought into the house for the purpose of killing the victim by the petitioner Lott. The petitioner Lott has made a prima facie showing that the victim had a kerosene gas lamp in his home which he used, a lamp that would have used the type of kerosene lamp fluid which caused the victim's death. Lott has made a prima facie showing that the prosecutor made statements to the court at trial directly contrary to these facts which he knew to be true in order to use the lamp fluid to prove premeditation, an element required in order for the prosecutor to secure the death penalty. Through the citation and quotation of many Ohio opinions, Lott has also made a prima facie showing that the prosecutor has been guilty of similar misconduct in more than ten other cases. n1

> n1 Part of the prima facie case offered on this point is found on page 1 of Lott's application, as follows:
>
> Mr. Lott's trial prosecutor, Carmen Marino, has a shameful track record of breaking rules to win convictions. *See State v. Liberatore*, 69 Ohio St. 2d 583, 589-90, 433 N.E.2d 561 (1982) ("the prosecutorial blunders in this case are too extensive to be excused."); *State v. Owensby*, 1985 Ohio App. Lexis 7351, *3 (1985) ("prosecutor's comments clearly outside the bounds of mere 'earnestness and vigor[.]'"); *State v. Heinish*, 1988 Ohio App. Lexis 3644, *20 (1988) ("Clearly the prosecutor improperly commented on excluded evidence."); *State v. Harris*, 1990 Ohio App. Lexis 5451 (1990) (prosecutorial misconduct found, but harmless); *State v. Hedrick*,

1990 Ohio App. Lexis 5647 (1990) (prosecutorial misconduct by making improper comments on matters outside of record and on defendant's failure to testify.); *State v. Durr*, 58 Ohio St. 3d 86, 568 N.E.2d 674 (1991) (improper comments on the appellant's unsworn statement, the appellant's prior convictions, and mitigating factors held harmless.); *State v. Keenan*, 66 Ohio St. 3d 402, 613 N.E.2d 203 (1993) (presenting an "aggravated example" of prosecutorial misconduct); *State v. D'Ambrosio*, 67 Ohio St. 3d 185, 1993 Ohio 170, 616 N.E.2d 909 (1993) (prosecutorial misconduct found, but either waived or harmless); *State v. Johnson*, 1992 Ohio App. Lexis 4256, *17 (1993) (prosecutorial misconduct "[rose] to the level of being constitutional errors."); *State v. Matthews*, 1999 Ohio App. Lexis 896, *5 (1999) (prosecutor denied making a deal with witnesses, however, "there is ample evidence to suggest that [the witness] at least did in fact receive just what the assistant county prosecutor said he would not give him."); *State v. Larkins*, 2003 Ohio 5928, 2003 Ohio App. Lexis 5276 (2003), unreported (affirming grant of new trial upon finding that Marino withheld eyewitness descriptions not matching Larkin; hid a deal he struck to obtain the testimony of the only claimed eyewitness; then stood silent as she lied about the deal and her criminal record during trial).

Taking the evidence as a whole, we conclude that petitioner's application makes a prima facie showing of constitutional *Brady* error that, if proved in the district court, may be sufficient to cause the fact finder to reach the conclusion beyond a reasonable doubt that the petitioner was not guilty of premeditatedly murdering the victim.

Obviously, the egregious prosecutorial misconduct alleged here, if proved, must be deterred. So long as we value the

rule of law, such conduct, if it occurred, cannot be tolerated in any kind of case—much less in death penalty cases.

Accordingly, the application for an Order authorizing the district court to proceed with his application is hereby granted and the execution of Lott is hereby stayed pending adjudication in the district court.

DISSENT

Boggs, Chief Judge, dissenting. After a thorough review of the record, I can discern no legal basis upon which we could, much less should, grant Lott's request for consideration of a second habeas petition. Therefore, I respectfully dissent.

Lott appealed to this court the denial of his first petition for habeas relief, and this panel affirmed. *Lott v. Coyle*, 261 F.3d 594 (6th Cir. 2001). Any disposition of a habeas petition on the merits, including dismissing on the grounds of procedural default, means that a defendant has exhausted his unrestricted right to petition for habeas relief. *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000); *Harvey v. Horan*, 278 F.3d 370, 379 -80 (4th Cir. 2002) (citing cases from the Second, Fifth, and Tenth Circuits). The requirements for a successive habeas petition are strict and Lott cannot meet them.

The Antiterrorism and Effective Death Penalty Act (AEDPA) governs any subsequent petition for habeas relief; the relevant part of the statute states:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244 (b)(1)-(2).

Lott briefed his *Brady* and actual innocence claims in his first appeal of the habeas denial to this court. Appellant Br., *Lott v. Coyle*, 261 F.3d 594 (6th Cir. 2001) (*Brady*), 44 (actual innocence). Therefore, under 28 U.S.C. § 2244(b)(1), he cannot present them again. I question the assertion in the order that this current petition is "the first time in a federal court that the 'factual predicate' for the constitutional claim would be recognized and adjudicated." (Maj. Op. at 2). It is worth clarifying that the "factual predicate" for actual innocence is exactly the same as the *Brady* claim: primarily the victim's description of his assailant. This issue was briefed in the original case; this panel considered the variance in description in its original opinion. *Lott*, 261 F.3d at 618. The extent to which we "could" consider Lott's constitutional claims has not changed between his two petitions. We could consider his *Brady* claim in our earlier adjudication, did so, and found it procedurally defaulted.

We also could consider his actual innocence claim in 2001, did so, and expounded upon it at length *in dicta*. We ultimately decided that we could not reach an adequate conclusion because of insufficient evidence in the record about a confession that Lott had made, which was suppressed because of a Miranda violation. *Id.* at 620-21. We simply declined to decide whether Lott's confession would preclude an actual innocence claim; we did not conclude that the claim itself was beyond our purview. *Id.* at 621 ("Since this issue may now be pending in state court and has not been fully briefed before us, we reach no final conclusion regarding the effect of the confession.") (emphasis added). Nothing in the case law or statute suggests that our opinion was insufficient to constitute adjudication of Lott's first habeas petition and therefore relieve him of the burdens that AEDPA imposes.

If we truly did "not reach the constitutional merits" of Lott's actual innocence claim, the court's theory creates a clear mechanism for an end-run around the high bar of § 2244. This order, resting as it does on our procedural, rather than factual basis for a part of our ruling in Lott's first appeal, means that a panel can give a capital defendant exactly what AEDPA prohibits—two bites at the apple without actually having to meet AEDPA's standards for a successive petition, simply by failing to rule on the factual merits of some claim.

For instance, the majority never really says that Lott met the due diligence standard of § 2244(b)(2)(B)(i), it just slides around it by saying that this petition would be "the first time in a federal court that the 'factual predicate' for the constitutional claim would be recognized and adjudicated," though the majority immediately thereafter concedes that the evidence was discovered long ago. (Maj. Op. at 2).

Lott has made no showing of a new rule of constitutional law, and therefore 28 U.S.C. § 2244(b)(2)(A) is not an avenue of relief that is open to him.

Although Lott argues that his actual innocence claim is predicated on evidence that the prosecution withheld and was not available to the three-judge panel that convicted and sentenced him, the evidence came to light in 1991. Lott has had procedural difficulties getting the evidence before the courts, because his initial appellate lawyer chose not to introduce it. However, the standard here is evidence that "could not" have been discovered with due diligence. Not only could the evidence here have been discovered, it was. Clause (b)(2)(B)(i) is not satisfied.

In sum, we are presented with a petition for successive habeas that does not meet the criteria of the statute governing consideration of such claims. We have no legal basis on which to grant it.

Even if I could be persuaded to ignore the statute, I can see no interpretation of the evidence in question that would "be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). This is the test we must apply, rather than the much lower standard that the majority uses: "sufficient to cause the fact finder to reach the conclusion beyond a reasonable doubt that the petitioner was not guilty of premeditatedly murdering the victim." (Maj. Op. at 5). Compare *House v. Bell*, 311 F.3d 767, 778, n.4 (6th Cir. 2002) (en banc) (Merritt, J.) ("Scholastic arguments aside, surely no one would really hold the view that House should be executed if 99 of 100, or even 50 of 100, jurors would now seriously doubt the persuasiveness of the state's case. In the real world of nonhypothetical juridical minds, only a new trial with real jurors will resolve such a problem.") with *House*, 311 F.3d at 783 (Boggs, J., dissenting) ("the *Schlup* standard 'does not merely require a showing that a reasonable doubt exists in light of the new evidence, but rather that no

reasonable juror would have found the defendant guilty.'" *Schlup v. Delo*, 513 U.S. 298, 329, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). . . . The court's opinion expresses the court's belief that House's sentence must be overturned if 'even 50 of 100 . . . jurors would now seriously doubt the persuasiveness of the state's case.' . . . However, it is as clear as the English language can make it that this is not the standard stated by Justice Stevens in the quotation above.").

Prosecutorial misconduct is a separate issue and cannot be used to bolster a weak claim of actual innocence. Such misconduct can constitute the prerequisite constitutional violation for a claim for relief under *Schlup v. Delo*, but the petitioner cannot rely on that malfeasance to build an inference of actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995) (explaining that a petitioner asserting actual innocence must "support his allegations of constitutional error with new reliable evidence"). No matter how strenuous the rhetoric of condemnation of the prosecutor here, it is no substitute for compliance with AEDPA.

I will address briefly the evidentiary claims that Lott claims entitles him to bring a second habeas petition.

Discrepancies in Description

The victim was able to describe his assailant as an African-American man with long hair, a medium build, light skin, who wore a light-colored shirt, grayish tennis shoes, and a cap without a bill. When Lott was arrested, he had short hair and medium to dark skin tone. Since two weeks had passed between the assault and Lott's arrest, he had ample opportunity to cut his hair; in fact, his hair is so short in the photo taken when he was booked that one could easily conclude that he had very recently visited his barber. The police found tennis shoes matching the victim's description

in Lott's car. A sole print at the crime scene is at least consistent with that shoe, although not a confirmed match. The victim said his assailant was 5' 10"; Lott is 6 feet. I find that a remarkably good guess, given McGrath's vantage point: tied up on the floor.

That leaves only the difference of opinion between the shade of Lott's skin. The petitioner emphasizes that no make-up was ever found to support the speculation that Lott lightened his skin as part of a disguise. I agree that seems unlikely. However, the victim was an 80-year-old man who was on the floor, under attack, even on fire, when he observed his assailant. Therefore his perception of light skin may have been inaccurate. In any case, this remains the only discrepancy that cannot be readily explained; by no stretch of the imagination could one assert that no reasonable factfinder would have convicted, even had that contradiction been in the record.

Lott argues in his brief that McGrath was not able to identify Lott from the composite sketch. Police reports indicate that McGrath was not coherent at the time he was shown the sketch, fell asleep in the middle of the interview, and in fact died a few hours later. It can hardly be said that the discrepancy is so compelling that no reasonable factfinder would convict based on all the other trial evidence, not to mention the suppressed confession which must be weighed in assessing an actual innocence claim.

Kerosene Oil

Lott emphasizes in his petition that the prosecutor lied at his trial when he told the judges that McGrath did not own an oil lamp and that Lott must have brought the oil used to burn McGrath with him, showing his intent to murder the victim. The origin of the oil is immaterial to Lott's claim of actual innocence. Assuming that McGrath owned the oil, it was

available to Lott, who used it in his attack on the victim. Were this an argument about prosecutorial misconduct in the penalty phase of a capital trial, I would see the relevance. In this context, I cannot draw any inference from the oil that indicates Lott's innocence.

Lott has fallen far short of the requirement of producing "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). The initially-suppressed evidence, which boils down to a contradiction over skin tone, and false statement about the origin of the oil used to burn the victim, also cannot reach the standard enunciated in *Schlup v. Delo*: "the habeas petitioner [must] show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'... To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo* 513 U.S. 298, 327, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995) (citation omitted). *See Herrera v. Collins*, 506 U.S. 390, 417, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993) ("The threshold showing for such an assumed right [not to be executed if actually innocent] would necessarily be extraordinarily high."). Lott has not made a prima facie case of actual innocence nor shown that a constitutional violation is the cause of his conviction. Therefore, this panel has no grounds on which to consider his case further. I respectfully dissent from the grant of permission to file a new habeas petition, and the attendant stay of execution. I also dissent from our apparently limitless stay of execution despite the matter's being remitted to activity in the district court.

APPENDIX F

State v. Lott.

2002-1033.

Supreme Court of Ohio

96 Ohio St. 3d 1475; 773 N.E.2d 552

August 14, 2002, Decided

APPEAL NOT ACCEPTED FOR REVIEW

Moyer, C.J., dissents and would allow on Propositions of Law Nos. I, II, and IV.

Pfeifer, J., dissents and would allow.

APPENDIX G

State of Ohio, Plaintiff-appellee
vs.
Gregory Lott, Defendant-appellant

NOS. 79790, 79791, 79792

Court of Appeals of Ohio,
Eighth Appellate District, Cuyahoga County

2002 Ohio 2752; 2002 Ohio App. Lexis 2669

May 30, 2002, Date of Announcement of Decision

JUDGES: DIANE KARPINSKI, JUDGE.
FRANK D. CELEBREZZE, JR., P.J., CONCURS.
TERRENCE O'DONNELL, J., CONCURS IN JUDGMENT ONLY.

JOURNAL ENTRY AND OPINION

KARPINSKI, J.:
Appellant appeals the trial court denying his second petition for postconviction relief. For the reasons that follow, we affirm the judgment of the trial court.

In 1986, appellant was convicted of aggravated murder, aggravated robbery, petty theft, aggravated arson, and two counts of aggravated burglary. In 1987, a three-judge panel sentenced appellant to death as a result of his conviction for the aggravated murder of John McGrath. n1 On direct appeal to this court, all of appellant's convictions and sentences were affirmed in *State v. Lott* (Mar. 16, 1989), 1989 Ohio App. Lexis 969, Cuyahoga App. No. 54537. The Ohio Supreme Court also affirmed appellant's convictions in *State v. Lott* (1990), 51 Ohio St. 3d 160, n2, 555 N.E.2d 293

n1 Appellant's additional sentences and fines as a result of his other convictions are not pertinent to this appeal.

n2 Appellant's petition for writ of certiorari was denied by the United States Supreme Court in *Lott v. Ohio* (1990), 498 U.S. 1017, 111 S. Ct. 591, 112 L. Ed. 2d 596.

In September 1991, appellant filed his first petition for postconviction relief, which was denied by the trial court. On appeal, this court affirmed the trial court's decision. *State v. Lott*, 1994 Ohio App. Lexis 4965, Cuyahoga App. Nos. 66388, 66389, 66390, 1994 Ohio 4965 ("First Petition"). n3 Pursuant to R.C. 2953.23(A), appellant filed a second and successive petition for postconviction relief in March 2000. The trial court denied the second petition and that denial is now the subject of this appeal.

n3 Additional filings by appellant include an application for delayed reconsideration, denied by this court in *State v. Lott* (Apr. 15, 1994), Cuyahoga App. No. 54537. Cert. denied by the Ohio Supreme Court in *State v. Lott* (1995), 71 Ohio St. 3d 1491, 646 N.E.2d 467. Appellant also filed a petition for writ of habeas corpus in federal court, which was denied in *Lott v. Coyle* (N.D. Ohio 1998), 2 F. Supp. 2d 961. The Sixth Circuit affirmed in *Lott v. Coyle*, (6th Cir. 2001), 261 F.3d 594.

The nature of the crimes for which appellant was convicted is described in *State v. Lott* (1990), 51 Ohio St. 3d 160, 168, 555 N.E.2d 293:

In this. case, the prosecution proved beyond dispute the existence of certain highly probative circumstantial evidence.

Lott was indisputably linked to the victim's home by Lott's unexplained possession of the victim's car, by Lott's fingerprints at two separate locations in McGrath's home, and by a shoeprint on the floor of the victim's house consistent with Lott's gym shoes. From these facts and from other physical evidence of the scene established by the prosecution, there was sufficient probative evidence from which reasonable minds could conclude, as the trial panel did, that Lott robbed, set fire to and purposely killed McGrath, and burglarized his home. Lott's purposeful intention to cause death can be inferred from the act of pouring lamp oil over McGrath and setting him on fire.

The Ohio Supreme Court finally concluded that "Lott stands convicted on constitutionally adequate evidence." *Lott*.

Appellant presents two assignments of error, which are procedurally interrelated, and will, therefore, be addressed together.

ASSIGNMENT OF ERROR NO. 1:

GREG LOTT WAS DEPRIVED OF A FAIR TRIAL AND DUE PROCESS OF LAW BECAUSE ASSISTANT PROSECUTOR MARINO INTENTIONALLY SUPPRESSED COMPELLING EVIDENCE OF GREG LOTT'S ACTUAL INNOCENCE, AND IT IS UNCONSTITUTIONAL TO EXECUTE A PERSON WHO IS INNOCENT OF THE CRIME FOR WHICH HE WAS CONVICTED.

ASSIGNMENT OF ERROR NO. 2:

WHEN POST-CONVICTION COUNSEL FOR A CONDEMNED INMATE OBTAINS EVIDENCE OF HIS CLIENT'S ACTUAL INNOCENCE AND DOES NOT PRESENT IT TO A COURT IN A TIMELY FASHION,

THE CLIENT IS "UNAVOIDABLY PREVENTED FROM THE DISCOVERY" OF THOSE FACTS AND MAY PRESENT HIS CLAIM OF ACTUAL INNOCENCE PURSUANT TO OHIO REV. CODE. ANN. 2953.21 AND 2953.23.

The parties agree that this appeal falls under the authority of R.C. 2953.23, Ohio's successive postconviction relief statute. Because a postconviction relief proceeding is a collateral civil attack on a judgment, the judgment of the trial court is reviewed under an abuse of discretion standard. Abuse of discretion means more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Hall*, 1996 Ohio App. Lexis 947, Lorain App. No. 95 CA006065, citing *Cedar Bay Constr. Inc., v. Fremont* (1990), 50 Ohio St. 3d 19, 22, 552 N.E.2d 202.

Under the statute, appellant argues that, both before and during trial, the state failed to disclose evidence proving his innocence. He also claims that, even though his attorney had obtained this same evidence in 1991, he failed to present it in his first postconviction proceeding. Because his attorney never presented the evidence, appellant believes he received ineffective assistance of counsel in his First Petition.

I. Appellant's claims under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

According to appellant, during the trial, the state "hid detailed descriptions of the real killer that Mr. McGrath provided to the police; he hid crime stopper reports that corroborated Mr. McGrath's description of his attacker; and Marino hid the fact that an oil burning lamp was discovered in Mr. McGrath's home." Appellant claims the state violated his constitutional right to a fair trial and due process of law

because it withheld evidence which he claims was exculpatory.

Appellant bases his argument on the law pronounced in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Such evidence is material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). A reasonable probability is that which is sufficient to affect or undermine; confidence in the outcome of a trial. *Bagley, supra.*

Thus, there are three essential components of a *Brady* violation: (1) evidence at issue must be favorable to the accused because it is exculpatory or impeaching; (2) evidence must have been willfully or inadvertently suppressed by the State; and (3) prejudice ensued.

Brady, supra.

Moreover, the United States Supreme Court has held that the prosecution's "omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *United States v. Agurs*, 427 U.S. 97, 112-13, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1975).

Though the prosecution is responsible for disclosing all favorable evidence known to it as well as to those acting on its behalf, there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the

defense of all police investigatory work on a case." *Moore v. Illinois*, 408 U.S. 786, 795, 33 L. Ed. 2d 706, 92 S. Ct. 2562 (1972) (Determining that the witness withheld by the prosecution was merely an early lead that the police abandoned when eyewitnesses were found). *United States v. Mullins*, (6th Cir. 1994), 22 F.3d 1365, 1372; *See* also *Arizona v. Youngblood*, 488 U.S. at 55.

The prosecution has a duty, however, to disclose evidence favorable to the accused and necessary for him to receive a fair trial. *See Bagley, supra* 473 U.S. at 675; *Brady, supra* 373 U.S. at 87. If the prosecution fails to disclose *Brady* material, the defendant is required to show that there is a reasonable probability that the omission deprived him of a fair trial. *See Agurs*, 427 U.S. at 108.

In the case at bar, appellant argues that the victim's physical description of his attacker, from which a police sketch was made and crime stopper reports gathered by the police after the sketch was televised, were exculpatory. Apparently, after seeing the sketch, people called tips into the police. n4 Appellant argues that because the physical descriptions given in some of the reports were consistent with McGrath's description to police, they corroborate that description and thus tend to prove he was not the assailant. We underscore the fact that the reports are not reports by eyewitnesses to the crime. Also, appellant does not specify exactly which reports he believes would exonerate him as the perpetrator of the crimes for which he was charged and convicted. At best, any police investigation resulting from the crime stopper reports or follow-up on the physical description given by Mr. McGrath constitutes general investigatory work which is not the type of exculpatory evidence the state has to turn over to the defense. *See Moore*, 408 U.S. at 795. The prosecution has a duty to disclose only evidence that is favorable to a defendant. *See Brady*, 373 U.S. at 87. In the case at bar,

appellant presents no evidence that the crime stopper reports were exculpatory.

> n4 We note that appellant's brief does not reference exactly which call-in entries he believes are exculpatory. Appellee, however, does recite actual details from some of the specific pages comprising the reports. Most of the reports show calls by persons who had seen the televised sketch and who then identified a particular individual whom the caller believed to be a possible suspect. As noted by appellee, an example of a typical crime stopper call-in entry is, "caller said a person named "Payne" makes a living robbing people." Appellee brief at p. 23.

Nor is the victim's statement to the police exculpatory. McGrath described his assailant as six feet tall, that is, two inches taller than appellant. McGrath also identified his attacker as light complected with long hair, whereas appellant has a medium complexion and, at the time of his arrest, had short hair. We note, however, that a two-inch difference in height is not significant. Nor do we find the difference in complexion tones exculpatory in light of one witness' testimony that appellant was found with liquid make-up upon arrest and the witness believed he used the make-up to lighten his skin tone. Finally, appellant could have had his hair cut after the attack on Mr. McGrath.

Appellant's attorney, moreover, chose to keep the jury from hearing the victim's description of his attacker. Given the minimal differences between the victim's physical description of his assailant and appellant's physical traits, we do not conclude that the information would have necessarily been favorable to appellant. n5 We agree with the assessment of the Federal District Court that found that the description is not so contrary to Lott's actual appearance that it would have

made a material difference in the outcome of Lott's trial, given the other strong circumstantial evidence of guilt.

n5 McGrath was found on July 15, and appellant was arrested on July 30—ample time for his hair to be cut.

Appellant also claims the state withheld the fact that Mr. McGrath owned the oil-burning lamp found at the murder scene. It was this oil lamp that was used to set the victim on fire. Appellant postulates that had the state divulged before or during trial evidence of this ownership, he would not have been convicted, because the jury would have known he did not bring the incendiary device onto the premises. We disagree. In light of the entire record of evidence presented at trial, we cannot conclude that the victim's ownership of the oil lamp is material to the jury's evaluation of appellant's intent to kill his victim. Appellant was not charged with prior calculation and design. What is material is the fact that oil from the lamp was poured on the victim in order to set him on fire. This court fails to see how the crime for which appellant was convicted has anything to do with who owned the lamp containing the oil used to ignite the victim. It was an ugly act, no matter whether he brought the lamp with him or merely made use of a lamp already there.

Given the speculative nature of appellant's claims, this court cannot say that there is a reasonable probability that the result of the trial would have been different had the prosecution produced the victim's description of his assailant to police, the crime stopper reports, or evidence that the victim owned an oil-burning lamp. What must be considered in this balancing is that a witness observed defendant sitting in McGrath's car the day before McGrath was found. This witness described his clothing and that description matched clothing found in defendant's car. In addition, defendant's fingerprints were found in McGrath's home, and a shoeprint in McGrath's bedroom "generally matched the pattern found

in defendant's tennis shoe." Thus, there is independent evidence connecting him to the crime. We conclude, therefore, appellant has not established a *Brady* violation and is not entitled to relief. Appellant's *Brady* claims are not well-taken.

II. R.C. 2953.23(A).

For postconviction relief, a petition must satisfy the following conditions:

a court, may not entertain *** a second petition or successive petitions *** unless

(1) either of the following applies:

(a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.

(b) Subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right. added).

(2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence. (Emphasis added).

In the case at bar, appellant does not satisfy any part of R.C. 2953.23(A)(1) or (2). The record discloses that appellant received a copy of the police report he says contains Mr. McGrath's physical description. Appellant received the report on October 4, 1991, almost immediately after he had filed his First Petition. The record also discloses that the court did not render its decision on the First Petition until September 28, 1993.

Appellant never sought to amend his petition or otherwise present the report or its contents during the pendency of the First Petition. Thus, contrary to what the statute requires of him in his second request for postconviction relief, appellant has not established that he was "unavoidably prevented" from discovering the statement he actually had in his possession during the pendency of the appeal of his First Petition.

We also reject appellant's argument that he was unavoidably prevented from obtaining the crime stopper reports gathered by the police. Appellant does not explain how he was unavoidably prevented from obtaining copies of the reports or even when he learned they existed. Without more detail, we must conclude that neither the victim's description to police nor the crime stopper reports fall under R.C. 2953.23(A)(1).

Appellant's claims also fail under R.C. 2953.23(A)(2)

None of the evidence appellant claims should have been turned over by the state prior to and/or during trial, is sufficient for this court to conclude that a reasonable factfinder would have decided differently about appellant's conviction or eligibility for the death sentence. Above, we discussed the failure to show prejudicial effect on the conviction. As noted by the Ohio Supreme Court in *State* v.

Lott, at 168, "Lott stands convicted on constitutionally adequate evidence."

None of the evidence appellant discusses is either clear or convincing enough, within the context of all of the evidence presented at trial, to conclude, moreover, that the death sentence was improper. Given the heinous nature of the crime for which Lott was convicted and the amount of evidence upon which that conviction stands, we cannot conclude that the trial court abused its discretion in imposing a death sentence. Accordingly, appellant's claims fail under R.C. 2953.23(A)(2).

III. Res Judicata

We further conclude that each of appellant's claims are barred under the doctrine of res judicata. The doctrine applies to successive petitions for post-conviction relief. *National Amusements, Inc. v. Springdale* (1990), 53 Ohio St. 3d 60, 62, 558 N.E.2d 1178; *State v. Apanovitch* (1995), 107 Ohio App.3d 82, 87, 667 N.E.2d 1041; *McCann v. Lakewood* (1994), 95 Ohio App. 3d 226, 237, 642 N.E.2d 48.

Typically, the doctrine bars claims that could or should have been brought at trial or on direct appeal. However, res judicata also applies to foreclose a defendant from presenting claims that could or should have been brought in a first petition for postconviction relief. As we determined in Apanovitch, supra:

R.C. 2953.23 (A) permits, but does not require, the court to entertain a second or successive petition for similar relief based upon the same facts or on newly discovered evidence. Since a postconviction proceeding is a collateral attack on a civil judgment, the trial court has the same discretion to deny relief as in any other civil post-judgment motion. *See State v. Steffen* (1994), 70 Ohio St. 3d 399, 410, 639 N.E.2d 67.

Principles of res judicata bar the assertion of any claim that was or could have been raised at trial or on direct appeal. *Id.*, citing *State v. Duling* (1970), 21 Ohio St. 2d 13, 50 Ohio Op. 2d 40, 254 N.E.2d 670; *State v. Perry* (1967), 10 Ohio St. 2d 175, 39 Ohio Op. 2d 189, 226 N.E.2d 104, paragraph nine of the syllabus. To invoke discretionary relief, Apanovitch must show "'some objective factor external to the defense impeded counsel's efforts' to raise the claim in his prior petition." *Id.*, citing *McCleskey v. Zant* (1991), 499 U.S. 467, 493, 113 L. Ed. 2d 517, 111 S. Ct. 1454. Additionally, Apanovitch must show actual prejudice flowing therefrom. *Id.*

In the case at bar, every one of appellant's claims was either previously raised or could have been raised in the First Petition n6 or in his appeal for a writ of habeas corpus in the matter entitled *Lott v. Coyle* (6th Cir. 2001), 261 F.3d 594.

> n6 In *State v. Lott* (Nov. 3, 1994), 1994 Ohio App. Lexis 4965, Cuyahoga App. Nos. 66388, 66389, 66390, at pages *22-36, appellant presented and this court considered a variety of claims, including: (1) that the state did not disclose exculpatory evidence such as the absence of appellant's fingerprints inside McGrath's car which appellant had been seen driving just before McGrath was found; and (2) ineffective assistance of both trial and appellate counsel. Moreover, the Ohio Supreme Court previously concluded that evidence of the lack of fingerprints was not "favorable to the defense" because the lack of fingerprints neither proves or disproves anything material. The federal district court further explained:
>
> While a court could conclude that the lack of fingerprints might serve to weaken the force of Coleman's identification of Lott as the individual driving McGrath's car; the standard under the [Antiterrorism and Effective Death Penalty Act] is not

> whether the district court would come to the same conclusion, but whether the conclusion is debatable among reasonable jurists.

In *Lott v. Coyle*, 261 F.3d 594, supra, appellant sought a writ of habeas corpus in the federal court. In the petition, the court was asked to and did evaluate the same claims appellant presents here, namely, that the state withheld exculpatory evidence concerning: (1) the victim's descriptions of his attacker, descriptions put into written form by police; (2) crime stopper reports collected by police after McGrath's description was released to the public; and (3) the fact that McGrath owned an oil burning lamp. The court stated:

Lott argues that Respondent suppressed evidence from him concerning McGrath's description of his attacker, which Lott suggests differed significantly from his physical appearance ("description-by-victim claim"). Specifically, McGrath described his attacker to police, in a statement that was not introduced at trial, as a six-foot-tall, medium-build, very light-complexioned African-American man with long straight hair, who, at the time of the assault, was wearing a light-colored shirt, white-gray tennis shoes, and a cap without a bill. Lott is a medium-to-dark-complexioned African-American man, who is five feet, ten inches tall, 176 pounds, with short hair; at the time of Lott's arrest, police found light-colored tennis shoes in the trunk of his car. Lott also alleges, in what we will refer to as his "other-suspects claim," that Respondent withheld from Lott: (1) other physical descriptions of McGrath's assailant that were consistent with McGrath's description; (2) evidence that a light-complexioned man informed police officers that he was wanted for questioning in connection with McGrath's death and several burglaries; (3) evidence that one of eyewitness Deidra Coleman's neighbors described the perpetrator as having a heavy build with a pot belly; and (4) evidence that

McGrath told police in 1983 that he could identify the man who burglarized his home in 1983.

Lott failed to raise the description-by-victim claim at all in the state courts, and failed to raise the other-suspects claim either in the state courts or in his federal habeas petition, and thus, absent a showing of cause and prejudice for the defaults, is precluded from raising them now.

***

Lott maintains that Respondent withheld evidence concerning McGrath's ownership of an oil-burning lamp, which, if presented at trial, would have called into doubt the Government's theory that McGrath did not own a lamp (and thus had no reason to own heating oil) and that Lott brought a bottle of heating oil into McGrath's house with the express purpose of using it to set McGrath on fire. Lott also argues that Respondent withheld information concerning a frayed telephone cord found near the location of McGrath's body, which McGrath's assailant allegedly used to bind and restrain him. The introduction of this evidence at trial, Lott argues, "so infused the trial with unfairness as to deny [him] due process of law." Because the Cuyahoga County Court of Appeals and the Ohio Supreme Court rejected this claim on the merits, he contends that it cannot be procedurally defaulted. Although Lott challenged on direct appeal the trial court's admission of this evidence on the basis that the State failed to establish its relevance, it appears that Lott never raised in state court the specific objection he raises today, and thus we are foreclosed from reviewing it.

Lott, supra at 618-619.

Because all the claims presented here are exactly the same ones appellant advanced either in the First Petition or in his appeal on the writ of habeas corpus in *Lott v. Coyle*, *supra*,

the trial court did not err, because appellant's claims are barred by res judicata. The trial court correctly determined, in relevant part, that the doctrine of res judicata bars petitioner from raising and litigating his allegations that the State of Ohio failed to reveal exculpatory evidence. *State v. Lott* (April 15, 1994), Cuyahoga App. No. 54537.

In the case at bar, appellant does not offer any new evidence in support of his successive petition for postconviction relief. The record before us is bereft of any new supporting evidence distinguishing it from the claims brought in the First Petition or on appeal in *Lott v. Coyle*, supra. Because the state of the record is unchanged we reject appellant's attempt to analogize his situation in this second petition with the circumstances in *Kyles v. Whitley* (1995), 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555, in which the Supreme Court of the United States held that the existence of newly obtained criminal evidence required defendant's conviction to be reversed.

Appellant's next argument is related to his belief that evidence proving his innocence was withheld by his own attorney. Unlike the situation with the prosecution's failure to disclose exculpatory evidence, he argues that his own counsel, who had supposedly located the same evidence "two weeks" before his first petition for postconviction was filed, nonetheless, failed to present any of that evidence in the First Petition. As a result, appellant argues, he did not receive effective assistance of counsel during those proceedings. We reject this argument.

Appellant is claiming that he was denied his constitutional right to effective assistance of postconviction counsel in the first post conviction petition because his attorney did not present the evidence he had located. On its face, we reject this claim because there is no constitutional right to counsel, effective or otherwise, in state postconviction proceedings.

Coleman v. Thompson (1997), 501 U.S. 722, 752, 111 S. Ct. 2546, 115 L. Ed. 2d 640 citing *Pennsylvania v. Finley*, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987); *Murray v. Giarratano*, 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (applying the rule to capital cases); *State v. Crowder* (1991), 60 Ohio St. 3d 151, 573 N.E.2d 652. Consequently, a petitioner cannot claim a constitutional violation because of ineffective assistance of counsel in such proceedings. *Coleman, supra*. citing *Wainwright v. Torna*, 455 U.S. 586, 71 L. Ed. 2d 475, 102 S. Ct. 1300 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance).

In Ohio, we note that part of 2953.21(I)(1) allows for the appointment of counsel in a first postconviction proceeding "if a person has received the death penalty." Section (I)(2), however, abridges the right to postconviction counsel by expressly disallowing a subsequent claim of ineffective assistance of counsel during the initial postconviction proceeding. R.C. 2953.23(I)(2) states, in part:

The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

Even though the statute permits a petitioner sentenced to death to have appointed counsel in an initial petition for postconviction relief, that "right" to counsel, however, is not a state or federally protected constitutional right. *Coleman, supra.*

Finally, appellant asserts that Ohio's successive postconviction statute, R.C. 2953.23(A) is unconstitutional because it requires him to "show that he was unavoidably prevented from discovering the facts the petition is

predicated upon and that a reasonable factfinder would not have found him guilty or eligible for the death penalty." We reject appellant's claim because [a] postconviction relief proceeding is a collateral civil attack on a judgment and is not imbued with the same federal constitutional protections as are all of the criminal proceedings which precede it.

State v. Davie, 2001 Ohio App. Lexis 5842, Trumbull App. No. 2000-T-0104, citing *Pennsylvania v. Finley* (1987), 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990. Moreover, not only does the statute pass constitutional muster, n7 it correctly requires appellant to produce some affirmative evidence that, because he was unavoidably prevented from discovering facts, a constitutional error was committed either at trial or on appeal. Appellant has failed to produce the requisite evidence.

> n7 *Davie*, *supra*, 2001 Ohio App. Lexis 5842, found the statute constitutional.

For all the foregoing reasons, we overrule each of appellant's assignments of error. The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., P.J., CONCURS.
TERRENCE O'DONNELL, J., CONCURS
IN JUDGMENT ONLY.

DIANE KARPINSKY
JUDGE

N.B. This entry is an announcement of the court's decision. *See* App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). *See*, also, S.Ct.Prac.R. II, Section 2(A)(1).

APPENDIX H

Gregory Lott, Petitioner-Appellant,
v.
Ralph Coyle, Warden, Respondent-Appellee.

No. 99-4155

United States Court of Appeals
for the Sixth Circuit

261 F.3d 594

February 1, 2001, Argued
August 17, 2001, Decided
August 17, 2001, Filed

Before: Merritt, Boggs, and Cole, Circuit Judges. Cole, J., delivered the opinion of the court, in which Merritt, J., joined. Boggs, J., delivered a separate opinion concurring in part and concurring in the judgment.

R. Guy Cole, Jr., Circuit Judge. Petitioner-Appellant Gregory Lott ("Lott") appeals from the district court's denial of his petition for a writ of habeas corpus, setting forth four bases for relief: (1) Lott's case is prematurely before this Court inasmuch as the district court erroneously denied his request to conduct discovery and to hold an evidentiary hearing; (2) the three-judge panel that convicted him lacked jurisdiction; (3) Lott never executed a valid knowing, intelligent, and voluntary waiver of his constitutional right to trial by jury; and (4) the State of Ohio suppressed exculpatory evidence. The State of Ohio, through Respondent-Appellee Warden Ralph Coyle ("Respondent"), argues that Lott is procedurally barred from raising these claims before this Court, because

he failed to raise them on direct appeal in state court. For the reasons set forth herein, we AFFIRM the order of the district court in its entirety.

I. BACKGROUND

The East Cleveland, Ohio, home of John McGrath ("McGrath"), a 79-year-old African-American man, was burglarized on three separate occasions in August 1983. On August 24, 1983, after the third break-in, East Cleveland police detectives, in consultation with McGrath, devised a plan to apprehend the person or persons that had burglarized his home. They placed a clean drinking glass upside down over a quarter on McGrath's dining room table, anticipating that the burglar would lift the glass to remove the quarter, and in the process, leave his or her fingerprints. A fourth burglary occurred on September 7, 1983, after which McGrath again notified police. As predicted by the detectives, the burglar had moved the drinking glass and taken the quarter. The police analyzed the fingerprints obtained from the glass, but were unable to identify them at that time.

Three years later, on Saturday, July 12, 1986, McGrath drove his 1982 Ford Escort to a bank, where he cashed a $ 21 check. Patricia Hill, the head bank teller, stated that McGrath appeared to be in high spirits and in good health. On Monday morning, July 14, Deidra Coleman noticed McGrath's Ford Escort parked in her Cleveland, Ohio, neighborhood. Behind the wheel of the car was a young, African-American male, who remained in the car for almost two hours. Her suspicions aroused, Coleman walked by the car, looked at the driver, noted the license plate number, and twice called the police from a pay phone a block away. She provided police with a description of the vehicle and its license plate number. The car left at approximately 11:20 a.m. and returned thirty minutes later, at which time Coleman observed the driver

walk to the yard of her elderly neighbors, where Esther Turk was home alone. Again, Coleman notified the police. Shortly thereafter, she spotted the young man running from the Turks' home, while carrying a brown bag beneath his arm. Coleman and Turk's husband then entered the home and discovered a bruised Esther Turk shaking with her blouse undone. She had been assaulted and robbed.

Coleman, a trained artist, sketched for the police the driver she had seen in the Ford Escort parked outside the Turks' house. She subsequently identified Lott from a photo array as the driver of the vehicle. Coleman again provided City of Cleveland police detectives with the vehicle's license plate number, and they, in turn, used that information to identify McGrath as the owner. The detectives traveled to McGrath's house and sought to speak with him about his car. Upon seeking entry into the home, they were unable to elicit a response from anyone in the house. The following day, the detectives asked East Cleveland police officers to check on the welfare of McGrath. When uniformed East Cleveland police officers were also unable to rouse McGrath, they entered the house through an unsecured kitchen door, whereupon they discovered a bloody, semi-conscious, and severely burned McGrath lying on the bedroom floor of his home. Apparently, during the course of a burglary of McGrath's home, an unknown assailant had doused McGrath with heating lamp oil and set him on fire. McGrath suffered second-degree burns over twelve- to eighteen-percent of his body. The burns extended over his right back and side, lower and upper left side, both arms, and both knees. McGrath also suffered abrasions on his wrist, knee, and ankle, and a bruised left eye, which had apparently been caused by a blunt trauma.

At the time that police officers discovered McGrath, he was wearing a shirt that covered his burns, although the shirt itself was not scorched. Dried fluids (apparently from McGrath's

burning flesh) were present on the shirt and a strong odor emanated from McGrath's burns. Police also found, within a foot of McGrath's body, a frayed telephone cord, which police believe was used to bind McGrath's wrists and ankles. On an adjacent cabinet, police discovered an uncapped one-quart bottle of flammable heating lamp oil. One-third of the oil remained in the bottle. Other evidence of a fire included charred draperies and a sheet.

When police officers interviewed McGrath, he informed them that he recognized his attacker. McGrath described him as a six-foot-tall, medium-build, very light-complexioned African-American man with long, straight hair, who, at the time of the attack, was wearing a light-colored shirt, white-gray tennis shoes, and a cap without a bill. One week after McGrath provided police detectives with this description, he was interviewed again at the hospital, at which time he told them that he believed that he and his assailant were patrons of the same barber shop. Police detectives showed McGrath a composite sketch drawn by Coleman of the man seen driving his car. McGrath examined the sketch, but was unable to identify the sketched individual as his attacker. Both interviews of McGrath were memorialized in police reports. On July 23, 1986, McGrath died of acute bilateral bronchopneumonia stemming from his injuries.

City of Cleveland police officers arrested Lott in Cleveland for McGrath's murder on July 30, 1986. An investigation conducted by City of Cleveland police officers determined that an intruder had forcibly entered McGrath's home by removing a rear basement window from its frame and prying loose a panel on the door leading from the basement to the kitchen. The house had obviously been ransacked. Kitchen and bedroom drawers had been opened and emptied. The mattress to McGrath's bed had also been disturbed. The officers lifted a set of fingerprints from a church contribution envelope in McGrath's home and a fingerprint from a dresser

in the bedroom. Officers identified the fingerprints as Lott's and also determined that Lott's fingerprints matched those found on the glass that the officers had placed on McGrath's dining room table three years earlier. In McGrath's bedroom, the officers discovered a dusty shoeprint, which generally matched the pattern found on a pair of light-colored tennis shoes recovered by officers from the trunk of Lott's car on the date of his arrest. A few days after the discovery of McGrath, police officers located McGrath's car, which they believe Lott stole and drove for more than 28 hours prior to his apprehension.

II. PROCEDURAL HISTORY

A. Indictments and Trial

On August 8, 1986, a Cuyahoga County grand jury issued a nine-count indictment in Case No. CR 211002, charging Lott with, *inter alia*, felony murder, aggravated burglary, aggravated robbery, kidnapping, and aggravated arson, all of which were committed in 1986. n1 The Government attached to each count an aggravated felony specification, because Lott had previous convictions for aggravated robbery and aggravated burglary. A grand jury also indicted Lott in Case No. CR 211261 for the 1983 offenses against McGrath, charging him with, *inter alia*, aggravated burglary and petty theft. On October 17, 1986, in Case No. CR 212720, a grand jury re-indicted Lott on the aggravated arson count of Case No. CR 211002, which had been indicted incorrectly. This count also carried an aggravated felony specification. Lott pleaded not guilty to all counts charged in all the indictments.

n1 Lott was indicted for other crimes against other victims, but, for purposes of this opinion, we have listed only the charged offenses of which McGrath was the victim.

At a June 23, 1987, pre-trial conference, Lott waived his right to a jury trial both orally and in writing, opting instead to be tried before a three-judge panel, as permitted by Ohio law. The state trial court at this time also joined all offenses of the three indictments involving McGrath. A three-day trial ensued, which concluded on July 17, 1987, with a verdict of guilty as to all counts. The trial court, however, dismissed the kidnapping count pursuant to Lott's Rule 29 motion for judgment of acquittal.

After a two-day mitigation hearing, a three-judge panel unanimously concluded on July 29, 1987, that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt and, accordingly, sentenced Lott to death for McGrath's murder. On July 31, 1987, the panel sentenced Lott to, *inter alia*, fifteen- to twenty-five years' imprisonment for the aggravated robbery and aggravated burglary convictions, and six months' imprisonment for the petty theft conviction.

B. Direct Appeal

Lott's appointed counsel filed a brief on his behalf, alleging a number of trial and sentencing errors. The Court of Appeals of Ohio, Eighth District, Cuyahoga County ("Cuyahoga County Court of Appeals") affirmed Lott's conviction and sentence on March 16, 1989. *See State v. Lott*, 1989 Ohio App. Lexis 969, No. 54537, 1989 WL 24927 (Ohio Ct. App. Mar. 16, 1989). Lott appealed from this decision to the Ohio Supreme Court, setting forth seventeen assignments of error. The Ohio Supreme Court affirmed his conviction and sentence on June 6, 1990. *See State v. Lott*, 51 Ohio St. 3d 160, 555 N.E.2d 293 (Ohio 1990). On December 10, 1990, the United States Supreme Court denied Lott's petition for a writ of certiorari. *See Lott v. Ohio*, 498 U.S. 1017, 112 L. Ed. 2d 596, 111 S. Ct. 591 (1990).

C. Post-Conviction

Lott raised fifty-five bases for relief in his state court petition for post-conviction review, filed on September 6, 1991. On the motion of the state prosecutor, the trial court dismissed Lott's petition on September 28, 1993. *See State v. Lott*, Nos. 211002, 211261, 212720 (Cuyahoga Ct. of Common Pleas Sept. 28, 1993) (unreported). In his appeal to the Cuyahoga County Court of Appeals, Lott's merits brief, filed on February 15, 1994, set forth six assignments of error. The Court of Appeals affirmed the trial court's dismissal of his petition on November 3, 1994. *See State v. Lott*, 1994 Ohio App. Lexis 4965, Nos. 66388, 66389, 66390, 1994 WL 615012 (Ohio Ct. App. Nov. 3, 1994). On December 2, 1994, Lott appealed to the Ohio Supreme Court and alleged six assignments of error. The Ohio Supreme Court declined to accept jurisdiction over the case on March 15, 1995. *See State v. Lott*, 71 Ohio St. 3d 1491, 646 N.E.2d 467 (Ohio 1995) (unreported).

D. Murnahan

Lott filed an application for delayed reconsideration (also known as a Murnahan motion) on June 30, 1993, in the Cuyahoga County Court of Appeals, in which he argued that his appellate counsel had been ineffective in their representation of him during direct appeal for their failure to raise twenty-two additional assignments of error. The Court of Appeals denied Lott's motion on April 15, 1994, see *State v. Lott*, No. 54537 (Cuyahoga Ct. of Common Pleas Apr. 15, 1994) (unreported), and the Ohio Supreme Court affirmed the Court of Appeals's denial on September 7, 1994, see *State v. Lott*, 70 Ohio St. 3d 1435, 638 N.E.2d 1039 (Ohio 1994).

E. Federal Habeas

Lott filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio on February 3, 1997, setting forth twenty-two bases for relief. The district court denied the petition in its entirety on March 31, 1999. On April 14, 1999, Lott filed a motion to alter or amend the judgment, and submitted in support thereof 330 pages of documentation collected during the federal discovery process. The district court denied the motion on August 26, 1999. From these denials Lott now appeals.

III. DISCUSSION

A federal court may grant a habeas corpus petition only when it concludes that the state adjudication of the federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, see 28 U.S.C. § 2254(d)(2). Before a federal court may review a federal claim raised in a habeas petition, it must first determine whether the petitioner has exhausted the remedies available to him in state court. *See* 28 U.S.C. § 2254(b)(1). If a federal habeas claim has not been presented to a state court for adjudication, then it is unexhausted and may not properly serve as the basis of a federal habeas petition. *See Wainwright v. Sykes*, 433 U.S. 72, 87, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977).

Where a claim has been presented to a state court, and that claim was rejected on an adequate and independent state ground without an adjudication on the merits, a petitioner may seek federal habeas review of that claim only where he can establish "cause and prejudice" for the default. *See Cone v. Bell*, 243 F.3d 961, 967 (6th Cir. 2001). In evaluating

claims of procedural default, a reviewing court is guided by the following four-part inquiry:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule. . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction. . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. [Fourth, if] the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986) (internal citations omitted). The fourth prong requires a showing by the petitioner of a substantial reason to excuse the default and actual prejudice suffered as a result of the alleged constitutional error. *See Cone*, 243 F.3d at 967.

The vast majority of Lott's claims in the instant case are procedurally defaulted, and Lott has failed to establish cause and prejudice for default of those claims. He, then, is left to argue that our refusal to evaluate his procedurally defaulted claims would result in a manifest miscarriage of justice because he is actually innocent of the crimes of which he was convicted. *See Schlup v. Delo*, 513 U.S. 298, 314-15, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995). We are not persuaded that Lott has presented "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial," *id.* at 316, and thus cannot conclude that a manifest miscarriage of justice would result if we declined to review his procedurally defaulted claims. Accordingly, for the reasons

set forth both in the district court's thorough and well-reasoned opinion and in our discussion infra of Lott's claims, we AFFIRM the district court's denial of Lott's petition in its entirety.

A. Discovery/Evidentiary Hearing

1. Standard of Review

We review a district court's limitation on the scope of discovery for an abuse of discretion. *See* 28 U.S.C. § 2254(e)(2); *Lavado v. Keohane*, 992 F.2d 601, 604 (6th Cir. 1993). A district court may, in the context of a habeas proceeding, permit discovery, provided that the habeas petitioner presents specific allegations showing reason to believe that the facts, if fully developed, may lead the district court to believe that federal habeas relief is appropriate. *See* Rule 6(a) of Rules Governing Section 2254 Proceedings for the United States District Courts; *Lynott v. Story*, 929 F.2d 228, 232 (6th Cir. 1991). We review a district court's decision whether to hold an evidentiary hearing for an abuse of discretion. *See Mitchell v. Rees*, 114 F.3d 571, 577 (6th Cir. 1997).

2. Analysis

On November 18, 1997, Lott filed with the district court a motion for leave to conduct discovery, which the district court granted in part on March 18, 1998, except insofar as it sought leave to allow Lott to take the depositions of his previous counsel. The district court ordered the parties to complete discovery by May 15, 1998. Lott also requested an evidentiary hearing. In response to this request, the district court ordered him to brief for the court the reasons for his entitlement to an evidentiary hearing, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Briefing was to be completed by April 27, 1998. On April 23, 1998, after having already submitted some briefing on the issue, Lott requested an additional three weeks to file a supplemental brief on the same issue, so that he could include information within the brief that had been gained as a result of discovery. The district court granted Lott's request.

One month later, on May 22, 1998, after having completed the discovery permitted by the court, Lott filed an unopposed motion to compel discovery and to modify the scheduling order, because a City of Cleveland Police Department records custodian had failed to appear at a scheduled records deposition. Lott sought testimony from the custodian concerning "documents of investigation and analysis of fingerprints, documents or video or audio recordings relating to physical descriptions of the suspect, or any documents from the prosecutor's files relating to fingerprints or witness identification of the suspect or documentation of a decision to withhold such information from [Lott]," which Lott believed to be in the possession of the City of Cleveland Police Department. The court never ruled on the motion, and on March 25, 1999, both parties filed a joint motion for a status conference to resolve the discovery dispute.

On March 31, 1999, the district court denied Lott's motion because: (1) Lott sought to extend an already expired deadline (and one which had previously been extended), thus rendering the motion untimely; (2) Lott's counsel failed to certify that his informal, good-faith efforts to resolve the dispute had been unsuccessful; (3) Lott's counsel never attempted to address the dispute by resort to a telephone conference, as required by Local Rule 37.1; and (4) a review of the motion revealed that it was unnecessary, in light of the City of Cleveland's explanation, after it had conducted a thorough search, that the requested documents were not within its possession. The district court also denied the parties' joint motion for a status conference and Lott's

request for an evidentiary hearing. On April 14, 1999, Lott filed a motion to alter or amend the district court's judgment, pursuant to Fed. R. Civ. P. 59, which the district court denied on August 26, 1999. n2

> n2 Lott argued, *inter alia*, that the district court erroneously denied his motion to compel and prevented him from obtaining, through discovery, information to which he was entitled pursuant to a prior subpoena duces tecum that had been issued by the district court. In denying Lott's motion, the district court found that Lott had failed to comply with the relevant local rule; that, in any event, there was no discovery "dispute," because the City of Cleveland had turned over all documents in its possession and simply did not have what Lott requested; and that, even if the evidence were in the City of Cleveland's possession and showed what Lott said it would show, Lott would nevertheless not be entitled to the requested relief.

a. Discovery

Lott contends that the district court, in denying his motion to compel discovery, erroneously found: (1) that the motion was untimely, and (2) that the motion did not contain a certification from counsel stating that good-faith efforts to resolve the discovery dispute had been unsuccessful. In point of fact, Lott argues, the motion, which was the first and only one that had been filed, had been filed consistent with local discovery rules and did contain a good-faith certification from counsel. In light of the foregoing, and because the district court found that Lott had demonstrated good cause to conduct discovery, Lott contends that he was entitled to have his motion granted, and that the district court's failure to do so was error. *See Bracy v. Gramley*, 520 U.S. 899, 901, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997); *Lynott*, 929 F.2d at 232.

It appears that the district court's conclusion that Lott's motion was deficient rested in part on erroneous factual determinations. First, as to the question of timeliness, our review of the record suggests that, while it is true that Lott's motion sought to extend a deadline that had already expired, the deadline had not been previously extended, as the district court suggested. Moreover, while the district court correctly concluded that a motion to compel discovery must be filed within ten days of the discovery cut-off date, see N.D. Ohio R. 37.1, Lott in fact did comply with this rule, filing his motion on May 22, 1998, seven days after the May 15, 1998, discovery deadline. Second, it is undisputed that Lott's counsel attached to Lott's motion a letter to the prosecutor detailing counsel's difficulty in obtaining records from the City of Cleveland Police Department. We see no reason why such a letter would not qualify as the requisite good-faith certification from counsel. Despite these seemingly erroneous factual determinations, we cannot conclude that the district court abused its discretion in denying Lott's motion. The remaining considerations on which the district court's denial was based —Lott's failure to resort to the requisite telephone conference and the City of Cleveland Police Department's denial that it possessed the documents—provided a sufficient basis for the district court to conclude that denial was appropriate.

b. Evidentiary Hearing

As already discussed, the district court permitted Lott three weeks after the completion of discovery to file a supplemental brief outlining the reasons for his entitlement to an evidentiary hearing under AEDPA. Lott had already argued unsuccessfully that AEDPA did not change the legal standard for granting an evidentiary hearing. n3 The district court refused to allow him the opportunity to submit a supplemental brief on the issue, which he contends would have included exculpatory evidence obtained during the

federal discovery process; such evidence would have related to "Mr. Lott's *Brady*, identification, ineffective assistance of counsel, and cause of death claims."

> n3 Lott now argues that if AEDPA did change the relevant standard, then application of AEDPA would be unconstitutionally retroactive under *Landgraf v. USI Film Prods.*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). Lott's argument is wholly without merit. *See Lindh v. Murphy*, 521 U.S. 320, 324-26, 337, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997) (noting that Landgraf's default rule on the question of retroactivity is not implicated where, as here, a habeas petition was filed after the effective date of AEDPA).

Lott now argues that the district court's refusal to permit additional briefing, and an evidentiary hearing on the issues raised in that briefing, was error. Such a hearing, according to Lott, would have resolved material factual disputes, including those regarding "(i) the cause and prejudice excusing any procedural default that the Court deemed to exist; and (ii) the merits of his claims (including the identification, ineffective assistance of counsel, *Brady*, and cause of death claims)." He also suggests that if the district court had granted his motion to compel discovery, discussed supra, he could have included with the supplemental brief documents obtained from the City of Cleveland Police Department.

Respondent emphasizes Lott's contradictory positions that, on the one hand, AEDPA's enactment had no effect on the question whether he was entitled to an evidentiary hearing, and, on the other, that the district court abused its discretion by denying him the opportunity to brief the impact AEDPA had on his entitlement to an evidentiary hearing. Respondent also suggests that Lott's claim is fatally flawed because he fails to discuss how the district court's denial of his request for an evidentiary hearing prejudiced him; in the absence of

such a discussion, Lott cannot demonstrate that the district court abused its discretion. On the question of the district court's refusal to permit Lott to append additional discovery materials to his brief, Respondent again argues that Lott has failed to show how this denial prejudiced him; in any event, Respondent notes, the district court reviewed the disputed materials when it evaluated Lott's motion to alter or amend the judgment and concluded that they had no impact on its decisions concerning either Lott's entitlement to additional discovery and an evidentiary hearing, or the underlying merits of any of his claims.

While Respondent notes correctly that Lott has taken inherently contradictory positions, we presume that Lott is making alternative arguments, which he is permitted to do. Lott's first argument—that his right to an evidentiary hearing is not governed by AEDPA—is incorrect as a matter of law. Where a habeas petitioner has filed his petition after the effective date of AEDPA (April 24, 1996), section 2254(e)(2) of AEDPA provides the relevant standard for determining whether he is entitled to an evidentiary hearing. *See* Lindh, 521 U.S. at 326-27, 337. Lott filed his habeas petition on February 3, 1997. Section 2254(e)(2) provides:

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

Lott's second argument, that the district court abused its discretion by refusing to hold an evidentiary hearing, is also without merit. The district court concluded that Lott was not entitled to an evidentiary hearing because he was unable "to explain when and how he obtained the police notes which purportedly contain a misidentification by McGrath, and had presented no other evidence to suggest the existence of a factual predicate that could not have been previously discovered through the exercise of due diligence." Neither in his motion to alter or amend the judgment nor in his brief for purposes of this appeal did Lott address: (1) when and how he obtained the new factual information; (2) why that information could not have been previously discovered through the exercise of due diligence; (3) whether the facts underlying the claim would establish by clear and convincing evidence that, but for the omission of these facts at trial, no reasonable factfinder would have found Lott guilty; and, (4) as suggested by Respondent, how the district court's denial of an evidentiary hearing prejudiced him. n4 In light of the foregoing, we are not persuaded that the district court's denial of an evidentiary hearing was an abuse of discretion.

n4 Our independent review of the evidence Lott sought to use as the basis for an evidentiary hearing reveals that, even assuming Lott had not been able to discover the documents with the exercise of due diligence, he would not have succeeded in meeting the "clear and convincing standard" required of § 2254(e)(2)(B).

B. Jurisdiction

1. Standard of Review

In a habeas corpus proceeding, we review de novo a district court's legal conclusions and its factual findings for clear error. *See Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998). A habeas petitioner's ineffective-assistance-of-counsel claim is a mixed question of law and fact, to which a district court's determinations are subject to de novo review. *See Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). We review de novo a district court's procedural default rulings. *See id.*

2. Analysis

The State of Ohio has instituted a statutory scheme whereby a criminal defendant may waive a jury trial and request trial by a three-judge panel:

In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, [*sic*] shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof.

Ohio Rev. Code Ann. § 2945.05 (West 2000). Lott argues that he never executed a valid waiver of his right to trial by jury, because his jury waiver was neither file-stamped nor formally entered in the trial record. In the absence of a valid waiver, he contends, the three-judge panel that decided his case never had jurisdiction to try him and the resulting conviction is therefore void. n5 Respondent submits that Lott's claim is procedurally barred because he failed to raise it in his direct appeal or at any other point during the pendency of the state court proceedings. *See State v. Pless*, 74 Ohio St. 3d 333, 658 N.E.2d 766, 770 (Ohio 1996)

(holding that "the failure to comply with R.C. 2945.05 may be remedied only in a direct appeal from a criminal conviction"). n6 Lott responds that: (1) this claim is not procedurally barred because a state court reached its merits; (2) this claim, although unexhausted, is not procedurally barred; (3) even assuming this claim is procedurally barred, Lott can demonstrate cause and prejudice for the default; and, (4) in any event, a procedural default analysis is inapposite, because a challenge of a court's subject-matter jurisdiction may be made at any time. Each argument ultimately fails.

n5 We note that not only did Lott fail to raise this issue on direct appeal, but he also at various times conceded that the requirements of §§ 2945.05 and 2945.06 had been satisfied, even attaching the filed waiver form to his petition for post-conviction relief.

n6 Respondent also argues, in the alternative, that even if Lott's jurisdiction claim were not procedurally barred, Lott's claim, founded on alleged violations of a state statute (§ 2945.05) and state case law (Pless), would nevertheless be an inappropriate basis for the grant of a writ of habeas corpus, as errors of state law, without more, may not provide a basis for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991) (noting that only where a state law violation is also a violation of federal law may a petitioner obtain federal habeas relief). We agree that it is indeed a close question whether a court's failure to comply with each of § 2945.05's requirements is sufficient to invalidate an otherwise effective waiver, such that it can be fairly said that the ensuing trial was fundamentally unfair. It is nevertheless a question properly before us on habeas review.

Lott's jurisdiction claim, although predicated on state law, directly implicates the federal question of whether Lott's trial, in the absence of a jury, violated his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process. While a claim based solely on an error of state law is not remediable on a petition for habeas corpus relief, where "a state court's error in interpreting or applying its own law has rendered the trial that convicted the appellant so fundamentally unfair as to have deprived appellant of substantive due process in violation of the U.S. Constitution, "we may properly provide habeas relief. *Norris v. Schotten*, 146 F.3d 314, 329 (6th Cir. 1998). Thus, the task before us is to determine whether the state-law jurisdictional error alleged by Lott so deprived him of due process as to provide a basis for federal habeas relief. Such a determination necessarily requires some consideration of the merits of his claim, *see Serra v. Mich. Dep't of Corr.*, 4 F.3d 1348, 1354 (6th Cir. 1993) (conducting a threshold review of the merits of petitioner's state-law claim to determine whether his trial was fundamentally unfair), a point which Judge Boggs's concurring opinion impliedly concedes, post at 2001 U.S. App. Lexis 18516, *78 (noting that Judge Boggs's review of "the record evidence conclusively demonstrates that [Lott's] federal rights were not violated").

a. Whether claim is procedurally barred because state court reached merits.

Relying on the Cuyahoga County Court of Appeals's language in the decision on his Murnahan motion, Lott argues that his jurisdiction claim is not procedurally barred because the Court of Appeals reached the merits of the claim. The Court of Appeals stated that "[a] review of the record demonstrates that the appellant waived his right to a jury trial in conformity with Crim. R. 23(A) and R.C. 2945.05," suggesting that the Court of Appeals decided the merits of the waiver question (and thus did not raise a procedural bar to

consideration of the issue). That language, however, expressly referred to Lott's sixteenth proposed assignment of error, which concerned only the ineffectiveness of his appellate counsel for failing to argue on appeal the involuntariness of Lott's jury waiver. At no point did Lott ever raise in his Murnahan motion the instant jurisdiction issue as a discrete claim; the court, therefore, never had an opportunity to reach that precise issue.

It is true that Lott raised the jury-waiver issue, discussed infra, in state court. It is also true that the voluntariness of his waiver and the court's compliance with the requirements of § 2945.05 to effectuate a valid waiver are related issues—the former is a function of the latter. The relatedness of the issues, however, does not save Lott's claim. Lott's jurisdiction claim is not based on the same theory as the waiver claim that was presented in state court, *see Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998), and, in any event, Lott himself apparently viewed the issues as distinct, as evidenced by the fact that he raised them as separate assignments of error in his federal habeas petition. Lott's jurisdiction claim, therefore, is procedurally barred. n7

> n7 We also note that Pless, the case on which Lott most heavily relies to argue that strict compliance with § 2945.05 is required for a valid jury waiver, also expressly provides that "the failure to comply with R.C. 2945.05 may be remedied only in a direct appeal from a criminal conviction." 658 N.E.2d at 770. Thus, on this basis alone, Lott's failure to raise this issue on direct appeal bars him from doing so now.

b. Whether claim is unexhausted, but not procedurally barred.

Lott argues that, even assuming the jurisdiction issue was not adequately presented in the Murnahan motion, the district court should have concluded that the claim was unexhausted

and permitted him to present this claim before a state court. Because this claim has not yet been aired in a state court proceeding, Lott contends, then no state court has enforced a procedural sanction against him, and his claim necessarily cannot then be procedurally barred, and the district court's finding of procedural default, therefore, was erroneous. We disagree.

State prisoners must exhaust their state remedies prior to raising claims in federal habeas corpus proceedings. *See* 28 U.S.C. § 2254(b), (c). This requirement is satisfied "when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). The district court in the case at bar, quoting our decision in *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994), found that the jurisdiction issue was procedurally barred because Lott lacked any remedy for the alleged error in the state courts; the absence of available relief, it reasoned, rendered moot the exhaustion question: "If no remedy exists, and the substance of a claim has not been presented to the state courts, no exhaustion problem exists; rather, it is a problem of determining whether cause and prejudice exist to excuse the failure to present the claim in the state courts." The district court expressly rejected Lott's contention that he had available to him an opportunity to file a successor delayed application for reconsideration, noting that "there is no available mechanism through which Lott could present his claims to the Ohio state courts."

The district court's conclusion is correct if its underlying assumption—that Lott was legally prohibited from raising the jurisdiction issue in a post-conviction action—is in fact true, a question we cannot answer given the record presently before us. Lott states that he filed his first successor post-conviction petition on March 31, 2000, raising this precise jurisdiction question. Because we do not have before us the

actual petition, or information concerning the posture of this action, we cannot determine whether the district court properly determined that Lott had no remedy available in state court.

Even assuming Lott does have a remedy in state court, however, we may nevertheless consider his unexhausted jurisdiction claim. *See* 28 U.S.C. § 2254(b)(2); see also *Jones v. Jones*, 163 F.3d 285, 299 (5th Cir. 1998) ("Because . . . we conclude that [petitioner] does not prevail on the merits, we may, pursuant to § 2254(b)(2), deny relief, notwithstanding Jones' failure to exhaust state remedies."); *Hoxsie v. Kerby*, 108 F.3d 1239, 1243 (10th Cir. 1997) (citation omitted) (noting that, even if a habeas petitioner has an available remedy in state court, a district court may nevertheless deny the petitioner's unexhausted claim without permitting him an opportunity to avail himself of the remedy in state court if to do so would avoid "useless litigation" in state court). Because, for the reasons set forth herein, we conclude that Lott's jurisdiction claim lacks merit, and any resort to the state courts would amount to a mere futility, we need not await a state court's determination of what we have already concluded.

c. Whether procedural default is excused by showing of cause and prejudice.

Lott asserts that even if his jurisdiction claim is procedurally barred, he can demonstrate cause and prejudice to excuse the default. We are not persuaded. To establish cause, Lott necessarily must argue that his appellate counsel were ineffective for failing to raise the jurisdiction claim, which requires us to examine first whether his counsel's error was so egregious as to render their assistance below that guaranteed by the Sixth Amendment, and second, whether Lott suffered prejudice as a result of his counsel's error. *See Strickland v. Washington*, 466 U.S. 668, 687, 691-92, 80 L.

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Ed. 2d 674, 104 S. Ct. 2052 (1984). Lott can make neither showing.

Lott never presented the state courts with an opportunity to review his ineffective-assistance-of-appellate-counsel claim as cause for the default of his jurisdiction claim, and thus, is procedurally barred from making such an argument now. *See Murray v. Carrier*, 477 U.S. 478, 488-89, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986). Even assuming, however, that Lott's claim were not procedurally barred, Lott cannot demonstrate cause for his procedural default, because he cannot establish the requisite cause for his ineffective-assistance-of-appellate-counsel claim. At the time that Lott filed his Murnahan motion on June 30, 1993, it was unclear whether, under Ohio law, a defendant's strict compliance with § 2945.05 was required to execute a valid waiver, or whether substantial compliance was sufficient. Compare *State v. Harris*, 73 Ohio App. 3d 57, 596 N.E.2d 563, 568 (Ohio Ct. App. 1991) (holding that strict compliance with § 2945.05 is required to execute a valid waiver) with *State v. Morris*, 8 Ohio App. 3d 12, 455 N.E.2d 1352, 1355 (Ohio Ct. App. 1982) (suggesting that substantial compliance is satisfactory, provided that § 2945.05 is satisfied "by a writing signed by the defendant himself and filed with the court") with *Marysville v. Foreman*, 78 Ohio App. 3d 118, 603 N.E.2d 1155, 1158 (Ohio Ct. App. 1992) (noting that "where there is a written waiver filed with the court after arraignment and opportunity to consult with counsel, there has been a substantial compliance with the applicable rules and statutes and there is no error"). Thus, we cannot conclude that Lott's counsel should have reasonably anticipated in 1993 the Ohio Supreme Court's 1996 decision in Pless, which finally resolved the issue and required strict compliance with each requirement of § 2945.05 for execution of a valid jury waiver. *See Alcorn v. Smith*, 781 F.2d 58, 62 (6th Cir. 1986) (noting that "nonegregious errors such as failure to perceive or anticipate a change in the law . . . generally cannot be

considered ineffective assistance of counsel"); *State v. Earl*, 1998 Ohio App. Lexis 3734, No. 62610, 1998 WL 474193, *5 (Ohio Ct. App. Aug. 10, 1998) (unpublished) ("Appellate counsel is not responsible for accurately predicting the development of the law, especially in an area marked by conflicting holdings."). Lott's failure to demonstrate cause makes unnecessary our consideration of whether he can also establish prejudice.

d. Whether procedural default analysis is inapposite.

Finally, Lott argues that the question of a court's subject-matter jurisdiction is never waivable and may be raised at any time. He reasons that an Ohio court has jurisdiction to try a defendant in the absence of a jury only when a defendant waives that right in strict compliance with § 2945.05; where a court disregards the mandatory requirements of § 2945.05, any resulting proceeding is rendered void *ab initio* for lack of subject-matter jurisdiction, and a challenge of that proceeding may be made at any time. Thus, Lott submits, the district court's procedural default analysis was inapposite.

The district court rejected Lott's characterization of the jurisdiction at issue in this case as subject-matter jurisdiction, and concluded that § 2945.05 concerned "jurisdiction of the particular case." "Jurisdiction of the particular case," the district court reasoned, does not, like subject-matter jurisdiction, concern the ability of a court to hear a particular class of cases, but rather is more akin to a statute of limitations or other quasi-jurisdictional bar that prevents a court from hearing a particular case that would, in the absence of that bar, properly be before it. While it is true that a challenge of a court's subject-matter jurisdiction may be raised at any time, the district court concluded that such was not the case for "jurisdiction of the particular case," which may be waived. In support of its conclusion, the district court relied on *State v. Swiger*, 125 Ohio App. 3d 456, 708 N.E.2d

1033 (Ohio Ct. App. 1998), and *Swiger*'s interpretation of Pless, as evidence that the Ohio Supreme Court was referring to something other than subject-matter jurisdiction. *See* 708 N.E.2d at 1039 ("If the 'jurisdiction' to which the [Ohio Supreme Court in Pless] referred were subject matter jurisdiction, by its very nature, it would be open to challenge at any time. By holding that this defect in the trial court's 'jurisdiction' can be waived if not timely raised, the Supreme Court was apparently referring to something other than subject matter jurisdiction.").

We are not convinced that the district court's conclusion rests on solid ground. In a post-*Swiger* case, the Ohio Supreme Court expressly held that the question whether a defendant was properly tried by a three-judge panel was a jurisdictional matter that can never be waived. *See State v. Filiaggi*, 86 Ohio St. 3d 230, 714 N.E.2d 867, 876 (Ohio 1999) ("The state contends that defendant consented to [a bifurcated procedure whereby a three-judge panel decided certain counts and a single judge decided others] and therefore waived any error. . . . We conclude that this jurisdictional matter cannot be waived."). Thus, Lott may be correct that the district court's procedural default analysis was misplaced. We need not resolve this question, however, because, as discussed supra, at the time that Lott sought to waive his right to a jury trial, it was an open question whether strict adherence to § 2945.05 was required to execute a valid waiver and confer jurisdiction on a three-judge panel. We believe that Lott's entry of a signed and written waiver made in open court, although not filed and made part of the record, would meet the less restrictive, pre-Pless substantial compliance standard. Lott, therefore, is foreclosed from obtaining federal habeas relief on this basis.

C. Jury Waiver

1. Standard of Review

Whether Lott's waiver of a jury trial was knowing, intelligent, and voluntary is a mixed question of law and fact that we review de novo. *See Strozier v. Newsome*, 926 F.2d 1100, 1104 (11th Cir. 1991).

2. Analysis

A three-judge panel tried and convicted Lott of offenses stemming from three separate indictments. Lott argues: (1) that, as to Case No. CR211002, the trial court and Lott's trial counsel failed to inform him of the circumstances and consequences of waiving his right to be tried by a jury in a capital case, and (2) that the trial court never obtained from him any jury waiver, valid or otherwise, as to Case No. CR212720 and Case No. CR211261.

a. Case No. CR211002

On August 8, 1986, a Cuyahoga County grand jury indicted Lott in Case No. CR211002, charging him in Count 5 with the July 23, 1986, aggravated murder of McGrath (with aggravated felony and felony murder specifications); in Count 6 with the July 14, 1986, aggravated burglary of McGrath (with violence and aggravated felony specifications); in Count 7 with the July 14, 1986, aggravated robbery of McGrath (with violence and aggravated felony specifications); in Count 8 with the July 14, 1986, kidnapping of McGrath (with violence and aggravated felony specifications); and in Count 9 with the July 14, 1986, aggravated arson against McGrath (with violence and aggravated felony specifications).

Lott argues that the colloquy between him and the trial judge was inadequate in informing him of the panoply of rights that he was giving up by foregoing a jury trial. n8 Specifically, the district court failed to inform Lott of the following: (1)

that the waiver would apply to the mitigation phase; (2) that the concurrence of only three (rather than twelve) people would be sufficient to convict him; (3) that the concurrence of only three (rather than twelve) people would be sufficient to convict him of the death penalty specification; (4) that the concurrence of only three (rather than twelve) people would be sufficient to sentence him to death; (5) that there would be fewer appellate issues available to him, concerning, for example, jury selection, pre-trial motions, and jury instructions; and (6) that Lott could withdraw the jury waiver at any time.

> n8 In an attempt to cast further doubt on the voluntariness of his waiver, Lott points to "an uncontradicted affidavit" submitted during the pendency of his post-conviction action that stated that "Mr. Lott evidences personality and behavioral indicators of early life trauma and that people who experienced early life trauma frequently have organic brain damage which affects their mental ability, personality, behavior, and judgment." The import of this statement is not clear. Lott's counsel, without elaboration, suggests that Lott may have suffered "early life trauma," and that, if he did in fact suffer such trauma, he might have suffered brain damage that might have affected his mental ability in a way that might have some bearing on our resolution of this issue. Lott devotes a mere two sentences to this issue, and seems to request that we pile inference upon inference to conclude that his waiver was not knowing, intelligent, and voluntary. This we cannot do. While we do not take lightly any suggestion that Lott lacked the mental ability to understand the rights he was waiving, *see United States v. Martin*, 704 F.2d 267, 273 (6th Cir. 1983) (noting that a defendant should have the "the mental ability and some knowledge of the jury trial right before he is allowed to waive it"),

> we cannot conclude, however, on the basis of nothing more than a speculative injury (to which Lott's own counsel cannot attest) that Lott's waiver was not knowing, intelligent, and voluntary.

Respondent contends that Lott's claim is procedurally barred, because he failed to raise this issue in his direct appeal, waiting instead until his state post-conviction action. As noted supra in the discussion concerning jurisdiction, Lott argued in his Murnahan motion that the Ohio Court of Appeals expressly found that "[a] review of the record demonstrates that the appellant waived his right to a jury trial in conformity with Crim. R. 23(A) and R.C. 2945.05," suggesting that the Court of Appeals evaluated the merits of the waiver question (and thus did not raise a procedural bar to consideration of the issue). Respondent maintains that the Ohio Court of Appeals's discussion was in the context of an ineffective-assistance-of-appellate-counsel motion and came after three other state courts had already determined that the waiver claim was procedurally barred.

Respondent has the better of the argument. Lott is procedurally barred from raising this issue. Both the Cuyahoga County Common Pleas Court and the Cuyahoga County Court of Appeals concluded that Lott was procedurally barred from raising this claim, because he failed to raise it in his direct appeal. Lott, then, is left to argue that this claim is not procedurally barred—either because he did raise the claim in his direct appeal, or because a state court, subsequent to the Court of Appeals's finding of procedural default, reached the merits of this claim—or that he can demonstrate cause and prejudice to excuse the procedural default. Lott makes both arguments, but neither is availing.

i. Whether claim is procedurally barred.

It is undisputed that Lott failed to raise the jury-waiver claim in his direct appeal. It appears that it was raised for the first time in his Murnahan motion, and there, only as the basis for his ineffective-assistance-of-appellate-counsel claim. Thus, the claim is procedurally barred, and absent a showing of cause and prejudice to excuse the default, we may not review the merits of this claim. Lott argues that, even if, on direct appeal, the Cuyahoga County Common Pleas Court and the Cuyahoga County Court of Appeals raised a procedural bar to this claim, the Cuyahoga County Court of Appeals's subsequent discussion of the merits of the issue, as it related to Lott's Murnahan motion, served to resurrect the otherwise defaulted claim. Respondent contends that the court's discussion in the Murnahan opinion addressed the merits of Lott's ineffective-assistance-of-appellate-counsel claim, and not those of his waiver claim, and thus, there remains a procedural bar. Lott responds that it was precisely because his appellate counsel failed to raise the waiver issue in Lott's direct appeal that Lott was forced to argue it in the context of a Murnahan motion.

Although Lott's argument is not without force, it ultimately must fail. First, that a court, in reviewing a claim of ineffective assistance of counsel, looks to the merits of the alleged error for purposes of determining the existence of Strickland prejudice is not dispositive of the question whether a procedurally defaulted claim has been resurrected. As the district court correctly observed:

The fact that the state courts engaged in that analysis, as they must under Strickland, does not, however, serve as evidence that those courts excused the procedural default. To hold otherwise would eviscerate the continued vitality of the procedural default rule; every procedural default could be avoided, and federal court merits review guaranteed, by claims that every act giving rise to every procedural default was the result of constitutionally ineffective counsel.

Second, and of equal importance, even if we were to accept Lott's argument that the panel that reviewed his Murnahan motion evaluated the merits of his waiver claim—a proposition that is flatly inconsistent with the record—we would nevertheless be bound to accept as authoritative the "last reasoned opinion" concerning Lott's waiver claim, which was the 1994 Cuyahoga County Court of Appeals's decision of Lott's post-conviction petition that found Lott's waiver claim to be procedurally barred. *See State v. Lott*, 1994 Ohio App. Lexis 4965, Nos. 66388, 66389, 66390, 1994 WL 615012 (Ohio Ct. App. Nov. 3, 1994) ("Appellant's claims alleging pre-trial error [including his waiver claim] are barred by application of the doctrine of *res judicata*."). In this regard, we are guided by the United States Supreme Court's decision in *Ylst v. Nunnemaker*, which established the following presumption:

> Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion fairly appears to rest primarily upon federal law, we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) (emphasis added) (internal citation and quotation marks omitted). The April 15, 1994, Court of Appeals's decision of Lott's Murnahan motion, in which the court concluded that "clearly, the appellant waived his right to a jury trial in a voluntary, knowing and intelligent fashion and the record further indicates that the appellant was fully aware

of the circumstances and consequences of the waiver," predated the November 3, 1994, decision (and thus could not have been the last reasoned decision), n9 and, in any event, addressed only the merits of the ineffectiveness claim (and not the waiver claim). Absent a showing of cause and prejudice to excuse this procedural default, therefore, Lott may not now challenge the validity of his waiver.

> n9 Lott is simply incorrect in his assertion that "any previous state court ruling regarding this ground does not apply because the last state court rendering a judgment—the Cuyahoga County Court of Appeals—reached the merits of this claim." The opinion concerning his Murnahan motion was actually decided in April 1994, before the Court of Appeals issued its November 1994 decision affirming the dismissal of his state post-conviction petition.

ii. Whether procedural default is excused by showing of cause and prejudice. n10

> n10 Lott argues that the record presently lacks information concerning the "fact-intensive inquiries regarding counsel's ineffectiveness as cause," in part, because the district court refused to allow him to conduct discovery and present evidence at an evidentiary hearing on the question of counsel's ineffectiveness. Lott argues with some force that the district court faulted him for failing to put forward sufficient evidence demonstrating counsel's ineffectiveness as cause for his default of this issue, but then refused to allow him to take discovery as a means of obtaining the requisite information. Because we have already considered the propriety of the district court's refusal to allow Lott to conduct discovery and to hold an evidentiary hearing, we will not address it further here.

Lott argues that any procedural default should be excused. In making a showing of cause, Lott states that his appellate and Murnahan counsel were constitutionally ineffective for failing to raise the waiver claim, and suggests that their actions could not have been the results of "a reasonable strategic decision." Relying upon our decision in *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999), which set forth eleven factors reviewing courts should consider in evaluating claims of appellate ineffectiveness, Lott argues that five such factors weigh in favor of our finding that his counsel were constitutionally ineffective: the omitted issues were significant and obvious; they were stronger than other issues; the appellate court was not required to defer to the trial court; the decision to omit the issue in question was unreasonable and one that only an incompetent attorney would adopt; and the appellate counsel's level of expertise and experience were such that he should have been able to raise successfully the Pless jurisdiction issue. On the question of prejudice, Lott maintains that he need not demonstrate prejudice, because the failings of his counsel violated his constitutional right to a trial by jury, and are thus structural errors from which we may presume prejudice. *See McGurk v. Stenberg*, 163 F.3d 470, 474 (8th Cir. 1998). Respondent argues that, in light of the written jury waiver and the on-the-record colloquy between Lott, his counsel, and the trial court, Lott's appellate counsel could have reasonably decided not to raise this claim. Furthermore, because the underlying claim lacks merit, it cannot be said that appellate counsel were ineffective for their failure to raise it.

Before we begin our analysis of the merits of Lott's argument, it is instructive to set forth the exchange between Lott and the trial court concerning the issue of Lott's waiver:

THE COURT: In discussions with the defense counsel prior to coming into court this morning, and in discussions with the prosecutor, it is my understanding at this time that the defendant has indicated to his counsel that in Criminal Case CR-211002, that he would agree and has consented to voluntarily, as indicated that he wishes to withdraw his previous request for a trial by jury with reference to the aggravated murder charge with specifications and consent to have his case tried to a three-judge panel.

Before this Court will accept that waiver and that request, the Court will inquire of the defendant as to whether or not it is his desire, having been appraised of his rights by both the Court and counsel, to waive his right to a trial by jury in these cases, and to agree to have his case tried to a three-judge panel.

Gregory Lott, the Court has been advised by your counsel that you wish to withdraw your previously entered plea—previous request for a trial by a jury on the count of aggravated murder with specification.

Do you fully understand that you have a constitutional right to have your case tried to a jury as it relates to the aggravated murder charge with specification?

Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Have you had an opportunity to fully discuss with your attorneys your rights to a trial by jury in the case of the aggravated murder with specifications and also have you had an opportunity to discuss with them your request or the appropriate request for a trial by a three-judge panel in lieu of a trial by jury?

DEFENDANT: Yes, sir.

THE COURT: Very well.

I have before me a form in Case No. 211002 entitled State of Ohio versus Gregory Lott, Court of Common Pleas, Cuyahoga County, Ohio, defendant may waive jury trial.

I, Gregory Lott, the defendant, in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a three-judge panel, in which said cause may be pending.

I fully understand that under the laws of the state I have a constitutional right to a trial by jury. That is signed by Gregory Lott, witnessed by James Kersey and Elmer Giuliani.

Is this, sir, a form that was executed by you indicating to this Court that you are waiving your right to a jury trial on the charge of aggravated murder, and have agreed to have your case tried to a three-judge panel?

DEFENDANT: Yes, sir.

The trial court then engaged in the following colloquy with Lott's counsel:

THE COURT: Mr. Giuliani, have you had an opportunity to fully explain to your client his rights to a trial by jury in this case?

MR. GIULIANI: Yes, sir.

THE COURT: Have you fully explained to him his right to elect to have his case tried to a three-judge panel in lieu of a trial by a jury in this case?

MR. GIULIANI: Yes, sir.

THE COURT: Are you fully satisfied that he fully understands those rights?

MR. GIULIANI: I am.

THE COURT: Are you satisfied that this is a voluntary act on his part, namely, to have his case tried to a three-judge panel?

MR. GIULIANI: Yes, sir.

THE COURT: Very well.

This Court will accept the defendant's waiver of a trial by jury on the count of aggravated murder with specifications and his election to be tried by a three-judge panel of this court.

It is well settled that "whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." *United States v. Martin*, 704 F.2d 267, 272 (6th Cir. 1983). In Martin, we held that a criminal defendant may waive a jury trial if the waiver is in writing, if the government attorney consents to the waiver, if the trial court approves the waiver, and if the defendant's waiver is voluntary, knowing, and intelligent. In the present action, only the fourth factor is in dispute. A waiver may be voluntary, knowing, and intelligent if the defendant has a minimum amount of knowledge concerning his jury trial right and the mental capacity to understand the implications of the waiver of that right. *See id.* at 273. Although a defendant need not have a detailed,

technical knowledge of this right, "[a] defendant is [deemed] sufficiently informed to make an intelligent waiver if he was aware that a jury is composed of 12 members of the community, [that] he may participate in the selection of the jurors, [that] the verdict of the jury must be unanimous, and that a judge alone will decide guilt or innocence should he waive his jury trial right." *Id.* at 273. We did not, however, adopt a mandatory rule requiring trial courts to interrogate defendants prior to accepting a jury trial waiver, but instead, offered a "suggestion" that district courts personally inform defendants of the "benefits and burdens of jury trials on the record prior to accepting a proffered waiver." *Id.* at 274.

We believe it is a close question whether the colloquies between Lott and the trial judge and between Lott's counsel and the trial judge were constitutionally sufficient. The colloquy between the trial court and Lott consisted of a short inquiry into whether Lott understood that he had a constitutional right to a jury trial and whether Lott had had the opportunity to discuss with his counsel the rights that he was forfeiting by waiving a jury trial. The trial court conducted no independent inquiry into the extent of the alleged discussions between Lott and his counsel, but rather, accepted the word of Lott and Lott's counsel that Lott understood those rights. The district court found that "a trial court need not conduct a particularly detailed oral inquiry before finding that a waiver is knowing and voluntary," and concluded that the colloquy between the trial court and Lott and his counsel demonstrated that Lott knowingly, intelligently, and voluntarily waived his right to a jury trial. On the facts of this case, we find no error.

b. Case Nos. CR212727 & CR211261

On September 5, 1986, a Cuyahoga County grand jury indicted Lott in Case No. CR211261, charging him in Count 1 with the September 7, 1983, aggravated burglary of

McGrath; and in Count 2 with the September 7, 1983, petty theft of McGrath. In Case No. CR212720, Lott was indicted on October 17, 1986, and charged in Count 1 with the July 14, 1986, aggravated arson against McGrath (with violence and aggravated felony specifications). Lott argues that the trial court never obtained a jury waiver as to Case No. CR211261 and Case No. CR212720, and that his trial counsel were not appointed to represent him with respect to these cases. In the absence of a valid waiver, the three-judge panel lacked jurisdiction to try him without a jury, and the convictions that flowed from that trial, at least as to Case No. CR212720 and Case No. CR211261, are void. Respondent asserts that the trial court had jurisdiction over all of the charges against Lott, and his waiver of trial as to one charge applied to all related charged offenses.

We reject Lott's argument. First, while not dispositive of the question before us, we note that Lott made no contemporaneous objection to the trial court's exercise of jurisdiction over Case No. CR212720 and Case No. CR211261. Second, a review of the merits of his claim reveals that he cannot prevail. Although it appears that no Ohio court has addressed the precise question presented by Lott's claim, the Ohio Supreme Court confronted a similar issue in *State v. Smith*, 80 Ohio St. 3d 89, 684 N.E.2d 668 (Ohio 1997). n11 In Smith, a defendant appealed his non-capital counts of conviction to the appropriate Court of Appeals, and, in conformity with the Ohio Constitution and an implementing statute, appealed his capital convictions directly to the Ohio Supreme Court. The Court of Appeals dismissed the non-capital charges for lack of jurisdiction, finding that appeal was proper only to the Ohio Supreme Court. The Ohio Supreme Court affirmed and found that it [the Ohio Supreme Court] had jurisdiction "over the whole case, instead of counts, charges, or sentences." 684 N.E.2d at 684.

n11 Respondent also cites *State v. Filiaggi*, 86 Ohio St. 3d 230, 714 N.E.2d 867 (Ohio 1999), in support of its position. Filiaggi, however, is inapposite. That case involved a defendant's appeal of his conviction for capital and non-capital charges, in which he challenged the trial court's decision to employ a procedure whereby a three-judge panel decided certain counts, and a single member of the three-judge panel decided the remaining ones. The court found no jurisdictional defect, but nevertheless concluded that the procedure violated § 2945.06 and remanded the case for resentencing. *See* 714 N.E.2d at 876-77.

Similarly, we are persuaded that Lott's waiver of a jury trial with respect to one case conferred jurisdiction on the three-judge panel to hear the entire case. *Cf. In re Waite*, 188 Mich. App. 189, 468 N.W.2d 912, 917 (Mich. Ct. App. 1991) ("Where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in the proceedings is only error in the 'exercise of jurisdiction,' as distinguished from the want of jurisdiction . . . ."). That Lott's murder case had been consolidated with other cases involving other offenses did not confer jurisdiction only as to the murder charge and not to the other offenses. The three-judge panel had jurisdiction over the entire case and all counts and charges contained within that case. Lott's argument, therefore, must fail.

D. *Brady* claim

1. Standard of Review

In a habeas corpus proceeding, we review de novo a district court's legal conclusions and its factual findings for clear error. *See Fair v. United States*, 157 F.3d 427, 430 (6th Cir.

1998). We review de novo a district court's procedural default rulings. *See id.*

2. Analysis

Lott argues that habeas relief is appropriate because the State of Ohio violated *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), by failing to disclose exculpatory evidence to him concerning the following: (1) the absence of fingerprints on McGrath's car; (2) McGrath's description of his assailant and other eyewitnesses' descriptions of other possible suspects, which were at variance with his physical appearance; and (3) McGrath's ownership of an oil-burning lamp. n12 Respondent contends that all three pieces of this alleged *Brady* material are procedurally barred from review, and that two pieces were never raised in the state proceedings below, and as such, are unexhausted. Even if we were to set aside these procedural default and exhaustion questions, Respondent argues, Lott still would not be entitled to relief because he cannot demonstrate both that Respondent suppressed the evidence and that such evidence was material to the outcome of his case.

> n12 Lott suggests that the record presently before us is not sufficiently developed to permit us "to answer the fact-intensive inquiries regarding the State's suppression and counsel's ineffectiveness as cause," and asks us to allow him the opportunity to take additional discovery and to remand the case with instructions that the district court hold an evidentiary hearing on the results of that discovery. For the reasons discussed supra, we reject this argument.

a. Procedural Default

i. Fingerprints

Lott contends that Respondent failed to disclose that police officers were unable to find any of Lott's fingerprints either on or inside McGrath's car, evidence that likely would have drawn into question the veracity of Deidra Coleman's testimony that Lott was the man she saw sitting in McGrath's car. Lott raised this claim on direct appeal (in the context of arguing that his trial counsel were ineffective for failing to raise this issue during the penalty phase at trial); as his sixteenth ground for relief in his state post-conviction petition; and as his second and twenty-first assignments of error in his Murnahan motion (in the context of arguing that his appellate counsel were ineffective for failing to raise *Brady* violations committed by the State). The question before us is whether Lott's direct appeal of this issue in the context of an ineffective-assistance-of-counsel claim is sufficient to save this issue from being deemed procedurally barred. As we have already noted, it does not.

Perhaps recognizing that this claim is procedurally barred, Lott argues that the Ohio Supreme Court's decision of Lott's fingerprints claim raised on direct appeal was a decision on the merits, which now precludes Respondent from arguing that the claim is procedurally barred. It is true that the Ohio Supreme Court, in reviewing Lott's claim, found that "this [fingerprint] evidence simply established that Lott's fingerprints were not found on McGrath's car. . . . [but the] mere absence of Lott's fingerprints does not refute evidence admitted at trial and is therefore not exculpatory," *State v. Lott*, 51 Ohio St. 3d 160, 555 N.E.2d 293, 308 (Ohio 1990), suggesting that it reached the merits of Lott's claim. Because, however, the court's discussion was in the context of analyzing Lott's ineffective-assistance-of-counsel claim (and not the discrete claim Lott now raises), that discussion, without more, cannot resurrect Lott's claim. n13 Similarly, Lott's argument that his claim was revived by the Ohio Court of Appeals's decision of his Murnahan motion (and its

discussion of the merits of Lott's fingerprints claim) also must fail.

> n13 We are mindful that such a rule may be perceived by some as unduly punitive of a petitioner for his appellate counsel's failure to engage in what might be viewed as double-pleading—that is, assigning error to a discrete violation, and then using the same alleged violation as a predicate for an ineffectiveness claim. This may be particularly so in those cases where, for any number of reasons, a petitioner's appellate counsel fails to raise an issue on direct review, an error, which while not sufficiently egregious as to constitute ineffective assistance, has the far-reaching effect of limiting the issues that subsequent counsel may raise. Unfortunate though it may be that the action (or inaction) of a petitioner's counsel on direct appeal may forever foreclose certain issues from appellate review, and thereby force us to turn a blind eye to what might be a meritorious claim, the law on this point is clear, and we are bound to follow it.

Lott also raised this *Brady* claim in his petition for state post-conviction relief. He now contends that a state court reached the merits of this claim both when the Cuyahoga County Court of Common Pleas granted Respondent's motion to dismiss, concluding that there were no substantive grounds for post-conviction relief, and when the Cuyahoga County Court of Appeals found that Lott had failed "to raise a genuine issue of material fact that there are substantive constitutional grounds for relief." Lott, 1994 Ohio App. Lexis 4965, *17, 1994 WL 615012 at *7. n14 Lott, however, neglects the fact that the Court of Appeals, in the last reasoned decision on the subject, made an express finding that "all of appellant's claims alleging pre-trial error [including the fingerprints claim] are barred by application of the doctrine of res judicata" because Lott failed to raise them

on direct appeal. *Id.* at *8. Accordingly, Lott's claim is without merit.

> n14 As further evidence that the merits of his claim were addressed, Lott points to the State's arguments in its brief in opposition to Lott's post-conviction petition that "Petitioner received all discovery to which he was entitled"; that the absence of fingerprints had been disclosed to Lott's counsel; that, in any event, no exculpatory evidence had been withheld; and that Lott had not suffered the ineffective assistance of counsel for the nondisclosure of exculpatory evidence. He makes the unsupported assertion that the State's argument of the merits in its brief estops it from now arguing that his claim is procedurally barred. We disagree.

ii. McGrath's Description of Assailant/Descriptions of Other Suspects

Lott argues that Respondent suppressed evidence from him concerning McGrath's description of his attacker, which Lott suggests differed significantly from his physical appearance ("description-by-victim claim"). Specifically, McGrath described his attacker to police, in a statement that was not introduced at trial, as a six-foot-tall, medium-build, very light-complexioned African-American man with long straight hair, who, at the time of the assault, was wearing a light-colored shirt, white-gray tennis shoes, and a cap without a bill. Lott is a medium-to-dark-complexioned African-American man, who is five feet, ten inches tall, 176 pounds, with short hair; at the time of Lott's arrest, police found light-colored tennis shoes in the trunk of his car. Lott also alleges, in what we will refer to as his "other-suspects claim," that Respondent withheld from Lott: (1) other physical descriptions of McGrath's assailant that were consistent with McGrath's description; (2) evidence that a light-

complexioned man informed police officers that he was wanted for questioning in connection with McGrath's death and several burglaries; (3) evidence that one of eyewitness Deidra Coleman's neighbors described the perpetrator as having a heavy build with a pot belly; and (4) evidence that McGrath told police in 1983 that he could identify the man who burglarized his home in 1983.

Lott failed to raise the description-by-victim claim at all in the state courts, and failed to raise the other-suspects claim either in the state courts or in his federal habeas petition, and thus, absent a showing of cause and prejudice for the defaults, is precluded from raising them now. He argued unsuccessfully before the district court that, because he raised his fingerprints claim on direct appeal (as part of an ineffective-assistance-of-trial-counsel claim), the instant *Brady* claims are not defaulted, reasoning that he fairly presented to the state courts the legal theory on which his claim was based, even if he failed to present all of the factual premises for that claim.

Citing *Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1990), the district court found that "presen ing two claims under the same legal umbrella but with entirely different factual underpinnings, as here, does not constitute fair presentation to the state courts"; Lott's description-by-victim claim was not the "substantial equivalent" of the fingerprints claim presented to the state courts, because he failed to present "both the legal theory and the facts on which [his] federal claim rests." *Landano*, 897 F.2d at 669; see also *Daye v. Attorney Gen. of New York*, 696 F.2d 186, 191 (2d Cir. 1982) ("In order to have fairly presented his federal claim to the state courts the petitioner must have informed the state court of both the factual and the legal premises of the claim he asserts in federal court."). We agree with the district court that Lott's presentation of a *Brady* claim premised on the fingerprints issue does not permit him now to put forward

other supposed *Brady* claims predicated on factually dissimilar premises.

Even if Lott's claim were not procedurally barred, he would, as the district court found, nevertheless have difficulty demonstrating that "the information which forms the basis for this claim was outside, or dehors, the record at the time of his direct state court appeals, or that it became available to him only after state avenues to address it were no longer available to him." The district court rejected Lott's suggestion that the fingerprint evidence would have served to undermine the only identification of Lott at trial (Coleman's testimony) in a case that was built entirely of circumstantial evidence, reasoning that "while a court could conclude that the lack of fingerprints might serve to weaken the force of Coleman's identification of Lott as the individual driving McGrath's car, the standard under the AEDPA is not whether the district court would come to the same conclusion, but whether the conclusion is debatable among reasonable jurists." Although we recognize that the applicable AEDPA standard has changed since the district court considered this issue, *see Harris v. Stovall*, 212 F.3d 940, 942-43 (6th Cir. 2000) (discussing the Supreme Court's rejection in *Williams v. Taylor*, 529 U.S. 362, 408-13, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000), of the "debatable among reasonable jurists" standard), we are nevertheless unpersuaded that the state court's conclusion on this point resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). We thus reject Lott's argument.

iii. Oil-Burning Lamp/Frayed Telephone Cord

Lott maintains that Respondent withheld evidence concerning McGrath's ownership of an oil-burning lamp, which, if presented at trial, would have called into doubt the Government's theory that McGrath did not own a lamp (and

thus had no reason to own heating oil) and that Lott brought a bottle of heating oil into McGrath's house with the express purpose of using it to set McGrath on fire. Lott also argues that Respondent withheld information concerning a frayed telephone cord found near the location of McGrath's body, which McGrath's assailant allegedly used to bind and restrain him. The introduction of this evidence at trial, Lott argues, "so infused the trial with unfairness as to deny [him] due process of law." Because the Cuyahoga County Court of Appeals and the Ohio Supreme Court rejected this claim on the merits, he contends that it cannot be procedurally defaulted. Although Lott challenged on direct appeal the trial court's admission of this evidence on the basis that the State failed to establish its relevance, it appears that Lott never raised in state court the specific objection he raises today, and thus we are foreclosed from reviewing it.

iv. Cause and Prejudice/Exhaustion

As he has done with his other claims, Lott argues that his *Brady* claim may be unexhausted, but not procedurally barred, and if we do find a procedural bar, then he can demonstrate cause and prejudice to excuse that bar. Both arguments are without merit. Turning first to the cause and prejudice inquiry, we find that Lott cannot meet his burden. First, as the district court noted, Lott's counsel might reasonably have made a strategic decision not to raise this claim, particularly in light of the fact that the description provided by McGrath was not so materially different from Lott's actual appearance as to have affected the outcome of the trial. Second, the district court also observed that even if Lott's claim had been properly raised, it would have likely been rejected, both because McGrath's absence from trial made his prior description unnecessary for impeachment purposes, and because Lott's counsel successfully argued at trial that McGrath's statements were inadmissible hearsay. We agree and cannot conclude that the failure of Lott's

counsel to assert this claim was an error of constitutional magnitude sufficient to establish cause for his default.

On the exhaustion question, as already discussed, where a habeas petitioner files a mixed petition containing both exhausted and unexhausted claims, a district court may deny the petition upon a finding that the petitioner has no available remedy in state court and to dismiss the petition would amount to nothing more than a futility. Such is the case here. Because Lott's claims are procedurally barred—his attempt to argue the ineffectiveness of his counsel as cause for that bar is unavailing—we are foreclosed from considering these claims, absent a showing that failure to do so would result in a manifest miscarriage of justice.

b. Miscarriage of Justice

Even in the absence of cause and prejudice, a petitioner may overcome a procedurally defaulted claim upon a showing of actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 314-15, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995); *Herrera v. Collins*, 506 U.S. 390, 417, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993). Lott has long proclaimed his innocence in the killing of John McGrath, suggesting instead that the victim's own careless smoking was the cause of death. *See State v. Lott*, 51 Ohio St. 3d 160, 555 N.E.2d 293, 302 (Ohio 1990). In affirming Lott's death sentence, the Ohio Supreme Court dismissed this explanation as an "incredible hypothesis." *Id.* Yet the Ohio high court also acknowledged that "it is true that the trial court convicted Lott on circumstantial evidence." *Id.* Amid Lott's continued protestation of innocence, this is the most troubling aspect of the case. Although habeas review does not permit petitioners to re-try their cases in federal court, we must ensure that state convictions are supported by constitutionally adequate evidence. This safeguard is especially important when, as here, the petitioner argues that operation of procedural default rules would result in a

miscarriage of justice because, according to Lott, he is actually innocent of the aggravated murder.

Although the parties have not argued the point, and we therefore reserve judgment on it, we should note that the evidence supporting Lott's conviction is reinforced by his interview with the Cuyahoga County Sheriff's Department on the afternoon of his arraignment. *See* Motion to Take Judicial Notice of State Court Proceedings, Exhibit H. The police report of the interview reads:

When questioned about the above incident with Mr. John McGrath he [Lott] started crying. He stated he never intended to hurt Mr. McGrath. He went over to Mr. McGrath['s] house at 7:00 A.M. sometime in the middle of July and went to the back of the house and broke out a basement window. He went into the house and found Mr. McGrath in a front bedroom on the main floor of the house. He stated that the next thing he knew Mr. McGrath was tied up. He remembers using either telephone cord or electrical wire to tie him up. McGrath wasn't in bed when this took place but doesn't remember or know why he wasn't.

After he was tied up he took his car keys which were on a dresser or table either in the bedroom or the room next to it and left the house and got into the car, which was in the driveway and drove off with it. He described McGrath['s] car as being a smaller model car, dark in color.

When asked about any type of flammable [*sic*] fluid or liquid being put on Mr. McGrath and then setting it on fire he stated that he didn't remember anything about that. He was asked about why he broke into Mr. McGrath's house and why did he tie him up he stated he didn't know why he broke into the house, he didn't want him to contact the police when he left the house with his car . . . .

When questioned about his intent in the McGrath incident he stated he didn't know. He stated he didn't intent [sic] to hurt anyone and that he didn't know what he was doing. He stated that he would do anything to keep from [going] to the [electric] chair.

Because Lott spoke to the interviewing detective without counsel present, defense counsel moved to suppress the statement during trial. At the suppression hearing, the prosecutor only summarized the contents of the statement to avoid biasing the trial panel. The panel then granted the motion to suppress on the authority of *Michigan v. Jackson*, 475 U.S. 625, 636, 89 L. Ed. 2d 631, 106 S. Ct. 1404 (1986) ("We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.").

Although the panel did not consider Lott's statement in convicting him, a habeas court may take it into account in evaluating his claim of miscarriage of justice due to actual innocence. *See Schlup*, 513 U.S. at 327-28 ("In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial."); *see* also *Gall v. Parker*, 231 F.3d 265, 320 (6th Cir. 2000), cert. denied, 150 L. Ed. 2d 739, 121 S. Ct. 2577 (2001).

A more detailed review of the circumstances than appears in this record may show that Lott's inculpatory statement, although suppressed at trial, was voluntarily made and admits of no reason to doubt its reliability or truthfulness. Though Lott said he did not recall setting the fire that burned

McGrath, the State introduced evidence of Lott's fingerprints in the victim's home, his possession of the victim's car, and a shoeprint in McGrath's bedroom that generally matched Lott's shoes. Since this issue may now be pending in state court and has not been fully briefed before us, we reach no final conclusion regarding the effect of the confession.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

Boggs, Circuit Judge, concurring in part and concurring in the judgment. I concur in the judgment of the court and in most of the analysis in its opinion. I write separately because the majority addresses one issue I believe we need not and offers obiter dictum on an issue Lott has not pressed. I do not join Parts III.B and III.D.2.b of the majority opinion.

The heart of my disagreement with the majority lies in its analysis of whether Lott's jurisdiction argument presents a federal question, which analysis appears in footnote 6. Lott's claim here is based entirely on a state-law problem, as the majority's review of developing Ohio law reveals. Footnote 6 states that Lott's "jurisdiction claim, although predicated on state law, directly implicates the federal question of whether Lott's trial, in the absence of a jury, violated his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process."

Although Lott's brief cites *Lowery v. Estelle*, 696 F.2d 333, 337 (5th Cir. 1983), for a similar proposition concerning state-law claims brought before federal habeas courts, the material at that location is actually the petitioner's argument, which the court specifically declined to address because the petitioner failed to exhaust his state-law argument in state

court, see *id.* at 337-38. Fifth Circuit precedent on which Lowery relies, some of which Lott also cites in his brief, states the rule that federal habeas courts may not review an asserted state-law error in an indictment unless "the indictment is so fatally defective as to deprive the convicting court of jurisdiction." *Murphy v. Beto*, 416 F.2d 98, 100 (5th Cir. 1969); see also *Underwood v. Bomar*, 335 F.2d 783, 788 (6th Cir. 1964). This rule appears to be based on old caselaw holding that a complete lack of jurisdiction in the sentencing court may provide grounds for federal habeas relief. *See Frank v. Mangum*, 237 U.S. 309, 327, 59 L. Ed. 969, 35 S. Ct. 582 (1915) (". . . the writ of habeas corpus will lie only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings."); *Kaizo v. Henry*, 211 U.S. 146, 148, 53 L. Ed. 125, 29 S. Ct. 41 (1908); *Ex parte Siebold*, 100 U.S. 371, 375, 25 L. Ed. 717 (1879).

Lott, of course, claims no such fatal error in his indictments. And he does not claim that the Cuyahoga County Court of Common Pleas entirely lacked jurisdiction to try his case. To the extent his claim may fit into this language, he argues that a three-judge panel of that court lacked jurisdiction to try him due to a clerical oversight, such that a single judge and jury of that same court should have tried him. This is not the sort of complete lack of jurisdiction discussed in *Frank*, *Keizo*, and *Siebold*.

In actuality, Lott claims that he "never executed a valid knowing, intelligent, and voluntary waiver of his constitutional right to be tried by a jury." Yet his argument, based in state law, addresses solely the state-law validity of the waiver, rather than the federal standard that waiver of federal constitutional rights must be knowing, intelligent, and voluntary. It may be true that, under Ohio law, the three-

judge panel lacked jurisdiction because Ohio's procedures for protecting his state-law right to a jury trial are extraordinarily strict and the clerical oversight resulted in an incomplete waiver. *See* O.R.C. § 2945.05; *State v. Pless*, 74 Ohio St. 3d 333, 658 N.E.2d 766, 770 (Ohio 1996). But this has no bearing on whether his waiver of his right to trial by jury (which would have succeeded under Ohio law if the court clerk had time-stamped it, filed it, and made it part of the record) was effective to waive his federal constitutional right by being knowing, intelligent, and voluntary.

As the transcript of Lott's jury-waiver hearing demonstrates, JA at 754-57, Lott was well aware of the implications of his request to be tried before a three-judge panel. The record clearly shows that Lott's waiver of his right to trial by jury was knowing, intelligent, and voluntary, and therefore effective under the federal constitution. I do not consider it "a close question whether a court's failure to comply with each of § 2945.05's requirements is sufficient to invalidate an otherwise effective waiver . . . ." A state court's entirely internal mistakes cannot vitiate a constitutionally valid waiver, for those after-the-fact processes have no relation at all to the defendant's knowledge of his rights, his information regarding the implications of waiving them, or whether any improper forces made his decision to waive involuntary.

To say that a state law error may provide a basis for habeas relief when the error also violates federal constitutional rights states the obvious, but does not apply here. As *Estelle v. McGuire*, 502 U.S. 62, 67-68, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991), attempted to make clear, "'federal habeas corpus relief does not lie for errors of state law.'" Ibid. (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990)). The proper inquiry is whether federal constitutional rights were violated. We can, of course, look to compliance with prophylactic state procedures designed to safeguard parallel state rights (Ohio's statute and

jurisprudence nowhere mention the federal right to trial by jury), to inform our resolution of the federal question. While Lott's state-law jurisdictional argument could be said to "implicate" a federal question, the record evidence conclusively demonstrates that his federal rights were not violated. Indeed, Lott has advanced no meaningful argument that his waiver was not knowing, intelligent, and voluntary.

The majority's citation to *Norris v. Schotten*, 146 F.3d 314, 329 (6th Cir. 1998), and its discussion of substantive due process further confuse the issue before us. Norris explained that a state-law error in pre-trial proceedings can deny federal substantive due process when the error renders the defendant's trial fundamentally unfair. *See ibid.* (rejecting such a claim with respect to alleged denial of state statutory right to speedy trial because it "had nothing whatsoever to do with the fairness of the trial itself but rather [went] to the fairness of the petitioner's extended pretrial detention"). Not only does the alleged error of state law Lott raises "have nothing whatsoever to do with the fairness of the trial itself," it has nothing to do with the fairness of anything. It relates only to an internal regulation of Ohio's courts.

Additionally, determining whether the alleged state-law error so deprived Lott of federal substantive due process does not "necessarily require[] our consideration of the merits of his claim." Even if he were correct and his state-law claim meritorious, any such error could not possibly have resulted in the denial of a fundamentally fair proceeding. This court need not address the merits of Lott's state-law claim because any such error did not result in the denial of a federal right.

Finally, I do not join the majority's analysis of Lott's miscarriage-of-justice/actual innocence claim, in Part III.D.2.b. The majority needlessly analyzes a point "the parties have not argued," by discussing certain evidence that it is not even sure may be properly considered in evaluating

an actual innocence claim. The majority reserves judgment on the matter in part because "it may now be pending in state court." Such a discourse has little or no value. To the extent that it is an opinion at all, it may be an advisory opinion beyond the limits of our Article III jurisdiction to decide cases or controversies. *See Williams v. Zbaraz*, 448 U.S. 358, 367, 65 L. Ed. 2d 831, 100 S. Ct. 2694 (1980) (district court lacked jurisdiction to consider the constitutionality of a statute when none of the parties challenged its validity).

I concur in the court's judgment and, excepting these two points, in its opinion.

APPENDIX I

State of Ohio, Appellee,
v.
Lott, Appellant

No. 89-846

Supreme Court of Ohio

51 Ohio St. 3d 160; 555 N.E.2d 293

March 27, 1990, Submitted
June 6, 1990, Decided

In August 1983, a burglar broke into John McGrath's East Cleveland home three separate times. After each break-in McGrath, the murder victim, then seventy-nine years old, called the East Cleveland Police Department. On August 24, 1983, detectives placed a clean drinking glass upside down over a quarter on McGrath's dining room table. McGrath called the police in September after another break-in. As proven by fingerprints, a burglar had moved the glass and taken the quarter. Three years later, police identified the appellant, Gregory Lott, by his fingerprints as having burgled McGrath's home on September 7, 1983 and stolen that quarter.

On July 12, 1986, McGrath, driving his 1982 Ford Escort, stopped and cashed a check for $ 21 at a savings and loan. Patricia Hill, the head teller, described McGrath as chipper, and in fine spirits and good health that Saturday morning.

Two days later, around 9:15 a.m. on Monday morning, July 14, a Cleveland housewife, Diedrea Coleman, noticed that same Ford Escort parked in her neighborhood. The driver, a young male, remained sitting in the car almost two hours,

though he moved it once. Her suspicions aroused, Coleman walked by the car, looked closely at the driver, noted the license number, and called the police twice that morning from a pay phone a block away. The car left around 11:20 a.m. and came back thirty minutes later. Coleman watched the driver walk over to the yard of her elderly neighbors, the Turks. Coleman later noticed the driver running from the Turks' house carrying a brown bag under his arm. Shortly afterwards, she and Mr. Turk found Mrs. Turk bruised and shaking with her blouse undone. Coleman, a trained artist, drew a sketch of the driver for the police. After the police showed her various photos several times, Coleman on July 28, 1986 identified Lott, from a photo array, as the suspicious Ford Escort driver.

City of Cleveland detectives traced the Escort's license number, discovered it belonged to McGrath, and stopped by McGrath's home. Unable to get a response, they asked the East Cleveland police to check on McGrath's welfare. On July 15, uniformed officers stopped by McGrath's house. Also unable to get a response, they entered through an unsecured kitchen door. Inside, they found the house in shambles and ransacked, with drawers pulled open and their contents dumped on the floor.

Police found McGrath lying on the floor in a downstairs bedroom. Conscious and moaning, McGrath complained of pain and suffering from burns. It appeared from the scene that McGrath had been doused with flammable lamp oil and then set on fire. His face also had dried blood on it. Paramedics rushed McGrath to a hospital.

Treating physicians described the burns as causing a greenish ooze and having the odor of rotting flesh. When first seen by treating physicians, McGrath was severely dehydrated to a degree consistent with having received burns more than twelve hours old. The second degree burns, estimated as

covering twelve percent to eighteen percent of his body, extended over his right back, right side, lower and upper left side, both arms and both knees. His initial treating physician, Dr. Bruce Oppenheimer, noted a bruised left eye, apparently caused by a blunt impact injury resulting in swelling and bleeding. That physician believed, with reasonable medical certainty, that because of McGrath's age, and judging by the appearance and odor of the burns, he would not survive these injuries.

McGrath died in the hospital of acute bilateral bronchopneumonia on July 23, 1986. Dr. Jay P. Logeman, one of McGrath's treating physicians, noted that the pneumonia was caused by the burn injuries, the lack of early medical treatment for those burns, and the patient's age. The deputy coroner noted crusted abrasions on McGrath's wrist, knee and ankle. He ruled the death a homicide.

McGrath's home revealed compelling circumstantial evidence of what occurred. When found, McGrath wore a blue shirt which covered his burns, but was not scorched itself. Dried fluids were present on the shirt, and a strong odor was emanating from the burns. The trousers he wore were burned. Within a foot of McGrath's body, police found a telephone cord that had a plug on one end and was frayed on the other. On a nearby cabinet, police found a quart bottle of flammable lamp oil with the cap missing. The cap was later found on the bed. Only one third of the oil remained. Charred drapes and a sheet were found on the floor, but police did not see other evidence of a fire.

A burglar had forcibly entered McGrath's home by removing a rear basement window from its frame, leaving a gaping hole. The burglar had forcibly pried loose an entire panel on the door leading from the basement to the kitchen, splintering the panel into pieces. Evidence of theft or attempted theft abounded, with drawers in the bedroom and kitchen open and

their contents dumped. The bed's mattress was askew on the box springs. Police recovered McGrath's Ford Escort in the early morning of July 16.

Various items of evidence linked Lott to this crime. A shoeprint in the dust in McGrath's bedroom generally matched the pattern found on Lott's tennis shoes. Police recovered those shoes from the trunk of Lott's automobile when they arrested him. Police found Lott's fingerprints on a church contribution envelope in McGrath's home. McGrath had received the envelope less than a month before. McGrath did not attend church on Sunday, July 13, though he was very regular in attendance and contributions. Police also found Lott's fingerprint on a dresser in McGrath's bedroom. Lott had driven McGrath's stolen automobile more than twenty-eight hours before police found McGrath. Police arrested Lott on July 30, 1986 based on Coleman's identification.

Lott was indicted on three different occasions. On August 8, 1986 the grand jury indicted him on two counts of aggravated burglary, two counts of aggravated robbery, felonious assault, two counts of kidnapping, aggravated murder with a felony murder specification, and aggravated arson. On August 12, 1986 the grand jury indicted Lott on four counts of aggravated burglary, felonious assault, four counts of aggravated robbery, kidnapping, gross sexual imposition, and petty theft. Finally, on October 17, 1986, he was re-indicted for aggravated arson. The indictments alleged crimes against six victims, including McGrath, and contained prior felony and violence specifications. After arraignment on each indictment, Lott pled not guilty. Because Lott was indigent, the court appointed counsel to represent him. On June 23, 1987, Lott waived a jury trial. Additionally, at the request of the state, the court severed all counts except those relating to McGrath. The court then ordered the trial to proceed, without Lott's objection, for all offenses against McGrath: aggravated murder; two counts of aggravated burglary, one for the 1983

and one for the 1986 break-in; aggravated robbery; kidnapping; aggravated arson; and petty theft for the 1983 break-in.

On July 13, 1987, a panel of judges tried Lott for all the offenses relating to McGrath. On July 16, 1987, at the close of the prosecution's case, the court dismissed the kidnapping charge. The prosecution also was permitted to amend the aggravated murder charge and the felony murder specification in order to delete the references to kidnapping. On July 17, the court panel found Lott guilty of the aggravated murder of McGrath, two counts of aggravated burglary, aggravated robbery, aggravated arson, and petty theft. Lott was also found guilty of the death specification of murder during robbery and burglary, and of specifications alleging a prior felony conviction in all charges but the petty theft and one aggravated burglary charge. Following a sentencing hearing, the trial panel determined, beyond a reasonable doubt, that the aggravating circumstance outweighed any mitigating factors. Thereafter, the trial court sentenced Lott to death for the aggravated murder, fined him $ 41,000 and imposed maximum terms of consecutive imprisonment for the other offenses. On March 27, 1989, the court of appeals affirmed the convictions and death sentence, modified the sentence for one of the aggravated burglary convictions, and disapproved the fines due to Lott's indigency.

The cause is now before this court upon an appeal as of right. *State v. Lott*, 1989 Ohio App. Lexis 969 (Ohio Ct. App., Cuyahoga County, Mar. 16, 1989).

Wright, J. Moyer, C.J., Sweeney, Holmes, Douglas, H. Brown and Resnick, JJ., concur.

Wright, J. Gregory Lott appeals his convictions and sentence of death. We have reviewed Lott's seventeen propositions of law, independently balanced the aggravating circumstance against the mitigating factors, and evaluated the proportionality of the sentence to those imposed in similar cases. As a result, we affirm the convictions and sentence of death.

I

Joinder of Offenses

In his initial proposition of law (I), Lott claims he was deprived of due process through the joinder of the 1983 aggravated burglary and petty theft offenses with the 1986 offenses against John McGrath. Lott contends that the 1983 offenses were unrelated to the 1986 offenses and prejudiced his cause. He contends as well that evidence of the 1983 offenses was also inadmissible, since it fell under the "other acts" portion of Evid. R. 404(B). The state responds that Lott could not have been prejudiced by joinder and that Lott also waived any error by not requesting severance.

We turn first to Lott's assertions of prejudice through joinder. Before trial began Lott faced serious charges relating to crimes against five victims besides McGrath. At Lott's June 1987 pretrial hearing, the state agreed to press only the McGrath offenses in a single trial. Defense counsel was fully apprised of Lott's position and made the deliberate tactical decision to proceed in a single trial.

The law favors joining multiple offenses in a single trial under Crim. R. 8(A) if the offenses charged "are of the same or similar character." *State v. Torres* (1981), 66 Ohio St. 2d 340, 20 O.O. 3d 313, 421 N.E. 2d 1288. While joinder is a viable trial procedure, an accused may move to sever under Crim. R. 14 upon a showing of prejudice. For an appellate court to reverse a trial court ruling denying severance, the

defendant must demonstrate that the trial court abused its discretion.

"A defendant * * * under Crim. R. 14 has the burden of affirmatively showing that his rights were prejudiced; he must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial, and he must demonstrate that the court abused its discretion in refusing to separate the charges for trial." *State v. Torres*, *supra*, at syllabus.

A prosecutor can use two methods to negate such claims of prejudice. Under the first method, the "other acts" test, the state argues that it could have introduced evidence of the 1983 crimes under the "other acts" portion of Evid. R. 404(B), if the 1983 and 1986 offenses had been severed for trial. *See Bradley v. United States* (C.A.D.C. 1969), 433 F. 2d 1113, 1118-1119. Under the second method, the "joinder" test, the state is not required to meet the stricter "other acts" admissibility test, but is merely required to show that evidence of each crime joined at trial is simple and direct. *State v. Roberts* (1980), 62 Ohio St. 2d 170, 175, 16 O.O. 3d 201, 204, 405 N.E. 2d 247, 251; *State v. Torres*, *supra*, at 344, 20 O.O. 3d at 315, 421 N.E. 2d at 1291. Thus, when simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as "other acts" under Evid. R. 404(B). *State v. Roberts*, *supra; State v. Torres*, *supra; United States v. Catena* (C.A. 3, 1974), 500 F. 2d 1319, 1325-1326, certiorari denied (1974), 419 U.S. 1047.

The trial court joined the 1983 aggravated burglary and petty theft charges with the 1986 charges, as "similar" offenses under Crim. R. 8(A). Such joinder was proper because Lott had burgled the same house and stolen from the same victim in 1983. Indeed, the facts of the 1983 offenses were simple and direct. *State v. Roberts*, *supra; State v. Torres*, *supra*. It

is beyond credibility that the panel of judges would be confused by the offenses or would improperly cumulate evidence of the various crimes. *See State v. Brooks* (1989), 44 Ohio St. 3d 185, 542 N.E. 2d 636. In fact, Lott fails to explain how he would have defended differently if the 1983 offenses had been severed. *See Drew v. United States* (C.A.D.C. 1964), 331 F. 2d 85, at 88, 90-92.

Moreover, the plain error rule applied to Lott's objection to joinder raised now but waived at trial. As stated, Lott's defense counsel, with Lott's full knowledge, made the tactical decision to proceed, without objection, with a single trial on all charges relating to McGrath. "Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St. 2d 91, 7 O.O. 3d 178, 372 N.E. 2d 804, paragraph three of the syllabus. *See*, also, *State v. Wolery* (1976), 46 Ohio St. 2d 316, 75 O.O. 2d 366, 348 N.E. 2d 351. Since our independent review of the record reveals neither reversible error nor a manifest miscarriage of justice we find Lott's objections to such joinder to be without merit.

II

Evidence of Instrumentalities

In proposition II, Lott argues plain error and deprivation of due process rights by the admission of evidence concerning a telephone cord and bottle of lamp oil found near McGrath, evidence which Lott asserts was irrelevant and prejudicial.

The state clearly showed the relevance of the telephone cord. The cord that police found lying next to McGrath was unusual, indeed out of place. One end was torn and frayed; the other end had a telephone plug on it. Police could not link this cord to any telephone in the house. The deputy coroner

saw crusted abrasions on McGrath's ankle and wrist. Additionally, the ambulance run report noted a blue telephone extension cord looped around the patient's hand. Such evidence does not depend on what McGrath said, but what ambulance personnel saw, as is clear from the context of the evidence.

The state could hardly have shown the relevance of the lamp oil more clearly. The victim suffered second degree burns over twelve to eighteen percent of his body—burns from a fire, not chemicals. Yet, aside from some charred drapes, there was no evidence of a fire. McGrath himself clearly had been set ablaze; he was fuel for the fire. The instrumentality to explain this was within an arm's length—an open bottle of flammable lamp oil. Police found no matches or lighter, and no kerosene heater in the house to explain the lamp oil.

These nearby instruments of violence, the telephone cord and lamp oil, tended to prove the charged aggravated offenses of burglary, robbery, arson and murder. Evid. R. 401. Lott had no basis to object to admission of this evidence at trial and did not do so. Having failed to object to their admissibility, Lott now claims due process violations and plain error. Those claims lack merit. There was no miscarriage of justice and any error was waived. *State v. Williams* (1977), 51 Ohio St. 2d 112, 5 O.O. 3d 98, 364 N.E. 2d 1364, vacated on other grounds (1978), 438 U.S. 911; *State v. Long, supra; State v. Wolery, supra.*

III

Prosecutorial Misconduct – Trial

In propositions III and IV, Lott asserts that the prosecutor by his misconduct violated Lott's various federal constitutional rights, particularly his right to due process. The state denies misconduct, argues waiver through lack of defense

objections, and maintains that Lott was not prejudiced. Lott correctly argues that the prosecutor erred, but he fails to demonstrate prejudice.

Proposition III concerns the prosecutor's reference to evidence the court had previously rejected. The state offered into evidence a post-arraignment, August 12 statement by Lott that was secured in the absence of counsel. The court suppressed this evidence at a hearing during trial. The state moved to delete the term "kidnapping" from the aggravated murder charge and death penalty specification. Those charges alleged aggravated robbery, aggravated burglary and kidnapping. In so doing, the prosecutor repeatedly referred to Lott's pretrial statement that had already been suppressed as the source of evidence to prove kidnapping: "* * * [P]aragraphs 4, 5 and 6 tell what was done to restrain his [the victim's] freedom." "* * * [W]e could have proved the kidnapping very easily based on the statement." Despite defense objections, the court granted the motion to amend by deleting "kidnapping."

Lott describes the prosecutor's motion to amend as a thinly veiled attempt to inject the contents of the suppressed statement into the case. In response, the state correctly points out the need for the amendment, since the indictment's language in the conjunctive might have required proof of robbery, burglary and kidnapping.

In proposition IV, Lott complains of remarks by the prosecutor during closing argument which repeatedly referred to hearsay statements in the victim's medical records. Some examples will suffice: "In the record he says that he was tied up and burned by somebody." "I'm telling you that the man was tied up and burned to death * * *." "It is not a theory. What happened was that someone tied him up and burned him to death." Lott also accuses the prosecutor of

attempting to inflame the trier of fact to reach a verdict based on sympathy for the victim.

The test for prosecutorial misconduct is whether remarks are improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St. 3d 13, 14-15, 14 OBR 317, 318-319, 470 N.E. 2d 883, 885-886; *United States v. Dorr* (C.A. 5, 1981), 636 F. 2d 117, 120, citing *United States v. Garza* (C.A. 5, 1979), 608 F. 2d 659, 663. "* * * [T]he prosecution is entitled to a certain degree of latitude in summation, * * *" *State v. Liberatore* (1982), 69 Ohio St. 2d 583, 589, 23 O.O. 3d 489, 493, 433 N.E. 2d 561, 566. Indeed, "[i]n the tension and turmoil of a trial, both the prosecution and the defense have wide latitude in summation as to what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Stephens* (1970), 24 Ohio St. 2d 76, 82, 53 O.O. 2d 182, 185, 263 N.E. 2d 773, 777.

However, the United States Supreme Court had this to say about the role of a United States Attorney:

"* * * [H]e is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States* (1935), 295 U.S. 78, 88.

These comments apply with equal force to Ohio prosecuting attorneys. Prosecutors must avoid insinuations and assertions calculated to mislead. They may not express their personal beliefs or opinions regarding the guilt of the accused, and they may not allude to matters not supported by admissible

evidence. *See State v. Smith, supra*, at 14, 14 OBR at 319, 470 N.E. 2d at 885; *State v. Liberatore, supra*.

We have previously noted: "Where opinions [on guilt] are expressed on facts outside the evidence, or are predicated on inferences based on facts outside the evidence, such opinions have not been countenanced and the judgments in those cases have been reversed upon appeal." *State v. Stephens, supra*, at 83, 53 O.O. 2d at 186, 263 N.E. 2d at 777. However, where the reference to matters outside the record is short, oblique, and justified as a reply to defense arguments and elicits no contemporaneous objection, there is no prejudicial error. *State v. Watson* (1969), 20 Ohio App. 2d 115, 49 O.O. 2d 152, 252 N.E. 2d 305, paragraph two of the headnotes, sentence modified (1971), 28 Ohio St. 2d 15, 57 O.O. 2d 95, 275 N.E. 2d 153.

In this case, the court of appeals held that the prosecutor improperly referred to Lott's rejected pretrial statement. However, the prosecutor did legitimately move to amend the specification to delete kidnapping. He simply used that opportunity to repeatedly allude to the contents of Lott's statement.

The prosecutor also improperly injected hearsay statements from the hospital records during closing argument, mostly in response to court questions. Though the statements had been admitted, and the parties had stipulated to their authenticity, the court had declined to consider hearsay therein. By repeatedly referring to evidence not accepted by the court and expressing his strong personal opinion about the accused's guilt, the prosecutor exceeded reasonable limits of propriety.

Even so, as then Justice Rehnquist noted for the United States Supreme Court, "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v.*

Phillips (1982), 455 U.S. 209, 219. *State v. Johnson* (1989), 46 Ohio St. 3d 96, 102, 545 N.E. 2d 636, 642.

"* * * [G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial. * * * [Citations omitted.] * * *

"* * * [I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless including most constitutional violations." *United States v. Hasting* (1983), 461 U.S. 499, 508-509, certiorari denied (1985), 469 U.S. 1218.

In this case, the record does not show that the trial court afforded any weight whatever to the prosecutor's remarks about the excluded pretrial statement or to hearsay in the hospital records when the court decided this case. The normal presumption in a bench trial applies. It appears that the court "'* * * considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'" *State v. Post* (1987), 32 Ohio St. 3d 380, 384, 513 N.E. 2d 754, 759, certiorari denied (1988), 484 U.S. 1079, quoting *State v. White* (1968), 15 Ohio St. 2d 146, 151, 44 O.O. 2d 132, 136, 239 N.E. 2d 65, 70.

Moreover, although the prosecutor repeatedly referred to the defendant's suppressed pretrial statement, he did so obliquely. *See State v. Watson, supra.* As for the hospital records, the trial panel explicitly stated after the prosecutor's arguments that they would not and did not consider the hearsay statements therein.

Lott received a fair trial before trained jurists despite this prosecutorial misconduct. The trial court suppressed evidence, sustained defense objections, and granted defense

motions—all in an effort to be scrupulously fair. As for the claim that the prosecutor inflamed the passions of the trial judges, the judges closely questioned the prosecution in final argument. Their questioning and the record negate any claim of a verdict resulting from passion. Lott's assertions of prejudice from prosecutorial misconduct fail completely.

Lott's failure at trial to object to the prosecutorial remarks also waived any error. *State v. Johnson, supra; Snyder v. Stanford* (1968), 15 Ohio St. 2d 31, 44 O.O. 2d 18, 238 N.E. 2d 563. There was no miscarriage of justice and no plain error. *State v. Long, supra.*

IV

Insufficiency of Evidence

In proposition V, Lott argues the constitutional insufficiency of evidence. Lott asserts that the circumstantial evidence against him does not exclude every other reasonable hypothesis except that of guilt. Lott contends the prosecution built inference upon inference and that purposeful intent to kill was not established. He argues that McGrath's injuries may have been caused by careless smoking. With regard to robbery, he claims that any theft may not have been contemporaneous with force. As to burglary, he cites possible consensual entry.

Lott speculates on very remote possibilities. His speculations do not justify setting aside the lower court's verdict. *See State v. Eley* (1978), 56 Ohio St. 2d 169, 10 O.O. 3d 340, 383 N.E. 2d 132; *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212.

It is true that the trial court convicted Lott on circumstantial evidence. "But direct evidence of a fact is not required. Circumstantial evidence * * * may also be more certain,

satisfying and persuasive than direct evidence." *Micholic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 330, citing *Rogers v. Missouri Pacific RR. Co.* (1957), 352 U.S. 500, 508, fn. 17. Murder convictions and death sentences can rest solely on circumstantial evidence. *State v. Apanovitch* (1987), 33 Ohio St. 3d 19, 514 N.E. 2d 394; *State v. Nicely* (1988), 39 Ohio St. 3d 147, 151, 529 N.E. 2d 1236, 1239. "Circumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt." *State v. Kulig* (1974), 37 Ohio St. 2d 157, 66 O.O. 2d 351, 309 N.E. 2d 897, syllabus. *Accord State v. Stuttler* (1961), 172 Ohio St. 311, 16 O.O. 2d 101, 175 N.E. 2d 728; *State v. Johnston* (1988), 39 Ohio St. 3d 48, 529 N.E. 2d 898.

However, "* * * once the jury has reached its decision, an appellate court, in a case where circumstantial evidence is relied upon, will reverse only where the evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence." *State v. Graven* (1978), 54 Ohio St. 2d 114, 119, 8 O.O. 3d 113, 116, 374 N.E. 2d 1370, 1374. While inferences cannot be built on inferences, several conclusions can be drawn from the same set of facts; and a series of facts and circumstances can be used as a basis for ultimate findings. *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329, 58 O.O. 122, 130 N.E. 2d 820.

In this case, the prosecution proved beyond dispute the existence of certain highly probative circumstantial evidence. Lott was indisputably linked to the victim's home by Lott's unexplained possession of the victim's car, by Lott's fingerprints at two separate locations in McGrath's home, and by a shoeprint on the floor of the victim's house consistent with Lott's gym shoes. From these facts and from other physical evidence of the scene established by the prosecution, there was sufficient probative evidence from

which reasonable minds could conclude, as the trial panel did, that Lott robbed, set fire to and purposely killed McGrath, and burglarized his home.

Lott's purposeful intention to cause death can be inferred from the act of pouring lamp oil over McGrath and setting him on fire. "It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts." *State v. Johnson* (1978), 56 Ohio St. 2d 35, 39, 10 O.O. 3d 78, 80, 381 N.E. 2d 637, 640; *State v. Thomas* (1988), 40 Ohio St. 3d 213, 217, 533 N.E. 2d 286, 290, certiorari denied (1989), 493 U.S. 107 L. Ed. 2d 54, 110 S. Ct. 89. Intent "'can never be proved by the direct testimony of a third person and it need not be. It must be gathered from the surrounding facts and circumstances * * *.'" *State v. Johnson* (1978), *supra*, at 38, 10 O.O. 3d at 80, 381 N.E. 2d at 640, quoting *State v. Huffman* (1936), 131 Ohio St. 27, 5 O.O. 325, 1 N.E. 2d 313; *State v. Robinson* (1954), 161 Ohio St. 213, 53 O.O. 96, 118 N.E. 2d 517, paragraph five of the syllabus.

Lott argues unreasonably that McGrath may have burned himself through careless smoking. However, McGrath's burns were extensive, yet the fire was minimal. Lamp oil poured over McGrath offered a reasonable and the best explanation. Lott's incredible hypothesis of careless smoking would require that McGrath first douse himself with flammable lamp oil before carelessly setting himself on fire. Lott's speculations about consensual entry, or about the lack of a contemporaneous theft or attempted theft, are equally unreasonable given the condition of McGrath's home. Thus, Lott stands convicted on constitutionally adequate evidence.

V

Prior Felony Conviction Specification

In proposition VI, Lott argues prejudicial constitutional error. The aggravated murder charge contained as surplusage a prior felony conviction specification. The state argues this specification was proper in the event Lott were convicted of a lesser included offense to aggravated murder.

Since the trial panel convicted Lott of aggravated murder, that specification had no possible relevance. A prior felony conviction specification is not a specified aggravating circumstance for aggravated murder. R.C. 2929.04(A); *State v. Hamblin* (1988), 37 Ohio St. 3d 153, 157, 524 N.E. 2d 476, 480, certiorari denied (1988), 488 U.S , 102 L. Ed. 2d 550, 109 S. Ct. 515. Indeed, the trial panel should have struck that specification. Its inclusion complicated the proceedings. *See State v. Johnson* (1986), 24 Ohio St. 3d 87, 92, 24 OBR 282, 286, 494 N.E. 2d 1061, 1065; *State v. Penix* (1987), 32 Ohio St. 3d 369, 513 N.E. 2d 744. However, Lott waived any error by not moving to dismiss that specification. *State v. Williams, supra.*

Also Lott was not prejudiced by this surplusage language. The parties stipulated to the prior convictions at trial. The prior convictions were properly listed in the other charged felony counts. His prior convictions negated the possible mitigating factor of lack of a prior criminal record. R.C. 2929.04(B)(5). Simply because the sentencing panel found this specification to be proven does not establish the panel considered it when they sentenced Lott. In its sentencing opinion, the trial panel specifically adjudged "the defendant's past criminal record was not a factor in mitigation nor was it a factor in aggravation." (Emphasis added.) Decisions of trial panels are presumed to be regular. *State v. Post, supra.* Thus Lott's claim of prejudice from any error here lacks merit.

VI

Other Acts

In proposition VII, Lott argues improper "other acts" testimony. In her extensive testimony, Coleman identified Lott as the person driving McGrath's Ford Escort more than twenty-eight hours before the police found McGrath. Coleman especially noticed Lott because he acted suspiciously in her neighborhood and later assaulted and possibly robbed Mrs. Turk, an elderly neighbor. However, Coleman's testimony about other acts was an integral part of her identification of Lott.

Evidence of other acts, although they are crimes, is admissible for various purposes such as identity. Evid. R. 404(B). The relatively brief, benign and muted evidence about Lott's other similar crimes, presented here, constituted neither error nor prejudice to Lott's rights. *See Dowling v. United States* (1990), 493 U.S , 107 L. Ed. 2d 708, 110 S. Ct. 668; *State v. Jamison* (1990), 49 Ohio St. 3d 182, 552 N.E. 2d 180, syllabus; *State v. Byrd* (1987), 32 Ohio St. 3d 79, 92, 512 N.E. 2d 611, 624, certiorari denied (1988), 484 U.S. 1037; *State v. Watson* (1971), 28 Ohio St. 2d 15, 57 O.O. 2d 95, 275 N.E. 2d 153, paragraph one of the syllabus.

VII

Improper Guilt Standard

In proposition VIII, Lott argues the trial court applied an improper legal standard in adjudging his guilt in purposely killing McGrath. Lott constructs his argument based on a finding in the penalty phase. There the trial court said that "the setting of the victim (an elderly man of 84 [sic] years) on fire and the leaving of him unattended with the probability of death was a factor in aggravation." (Emphasis added.) As the court of appeals ruled, Lott's arguments lack merit.

Lott takes the sentencing panel's quoted language out of context since the sentencing panel was explaining why the nature and circumstances of the offense did not mitigate the death penalty. *See* R.C. 2929.04(B); *State v. Steffen* (1987), 31 Ohio St. 3d 111, 116, 31 OBR 273, 277, 509 N.E. 2d 383, 389. Thus, the sentencing panel used "probability" only in this limited sense. Proof of intention is elusive and can only be shown by objective facts and circumstances. Therefore persons are presumed to intend the natural, reasonable and probable consequences of their voluntary acts. *State v. Johnson* (1978), *supra*, at 39, 10 O.O. 3d at 80, 381 N.E. 2d at 640; *State v. Robinson, supra*. In fact, absent concrete evidence of an incorrect standard, the trial panel's adjudication is presumed regular. *See State v. Post, supra*. Clearly then the record does not support Lott's unwarranted assertion that the trial court applied an improper guilt standard.

VIII

Constitutionality

In proposition IX, Lott asserts that it is unconstitutional for Ohio to require proof of mitigating factors by a preponderance of the evidence. We have previously construed and upheld Ohio's statutory scheme and rejected similar arguments. *See State v. Jenkins* (1984), 15 Ohio St. 3d 164, 171-172, 15 OBR 311, 317-318, 473 N.E. 2d 264, 275; *State v. Stumpf* (1987), 32 Ohio St. 3d 95, 101, 512 N.E. 2d 598, 605; *State v. Lawrence* (1989), 44 Ohio St. 3d 24, 27, 541 N.E. 2d 451, 455.

In proposition XIV, Lott challenges the constitutionality of Ohio's felony murder scheme, which allows the same specified criminal acts to be a basis for the principal charge of aggravated murder and for the specification which elevated the crime to a death penalty offense. We have

rejected this argument in *State v. Jenkins, supra*, at 177-178, 15 OBR at 323, 473 N.E. 2d at 279-280; and in *State v. Henderson* (1988), 39 Ohio St. 3d 24, 528 N.E. 2d 1237, certiorari denied (1989), 489 U.S , 103 L. Ed. 2d 824, 109 S. Ct. 1357.

In proposition XVII, Lott argues that Ohio's death penalty statutes are unconstitutional. Defense counsel acknowledges that this court has upheld Ohio's death penalty statutes in *State v. Jenkins, supra*, at 168-179, 15 OBR at 314-324, 473 N.E. 2d at 272-281, and acknowledges that the issue is raised for preserving this issue for possible further review. We again recognize the constitutionality of these statutes.

IX

Aggravating Circumstances—Mitigating Factors

In propositions X, XI, XII, XIV, and XV, Lott asserts the trial court in its sentencing decision injected a nonstatutory aggravating circumstance, gave no weight to mitigating factors, and did not explain why the aggravating circumstance outweighed any mitigating factors.

"In scrutinizing death penalty procedures under the Eighth Amendment, the [United States Supreme] Court has emphasized the 'twin objectives' of 'measured consistent application and fairness to the accused.'" *Clemons v. Mississippi* (1990), 494 U.S , 108 L. Ed. 2d 725, 110 S. Ct. 1441, 1448, quoting *Eddings v. Oklahoma* (1982), 455 U.S. 104, 110-111. Indeed, it is within the province of this court to conduct its own careful appellate reweighing of aggravating circumstances against mitigating factors to produce a "measured consistent application" of the death penalty which would be in no way unfair to the defendant. *Clemons v. Mississippi, supra*. "Nothing inherent in the process of

appellate reweighing is inconsistent with the pursuit of the foregoing [twin] objectives." *Id.*

Thus, we hold that whatever errors the trial court may have committed in weighing the aggravating circumstance against any mitigating factors have been rectified by this court's careful independent reweighing. We uphold the trial court's sentence of death in this case and address each of Lott's asserted errors below.

In proposition X, Lott asserts the trial panel found that the act of setting the victim "on fire and the leaving of him unattended with the probability of death was a factor in aggravation." The court of appeals held such a finding was harmless error.

It is true that the nature and circumstances of an offense are not a statutory aggravating circumstance and cannot be considered as such. *State v. Davis* (1988), 38 Ohio St. 3d 361, 370-372, 528 N.E. 2d 925, 933-936, certiorari denied (1989), 488 U.S , 102 L. Ed. 2d 980, 109 S. Ct. 849; *State v. Johnson* (1986), *supra*, at 93, 24 OBR at 287, 494 N.E. 2d at 1066. However, a trial court is required to "* * * consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense * * *." R.C. 2929.04(B). In *State v. Moreland* (1990), 50 Ohio St. 3d 58, 69, 552 N.E. 2d 894, 905, this court said:

"* * * In its sentencing opinion, it was wholly proper for the panel to rely upon and cite the nature and circumstances of the offense as reasons for supporting the finding that the aggravating circumstance outweighed the mitigating factors. *Stumpf, supra*, [paragraph one of the syllabus]. We presume that the panel knew the difference between an aggravating circumstance on the one hand and the nature and circumstances of the crime on the other hand. Simply

because the panel referred to aggravating circumstances does not mean that the nature and circumstances of the crime became a nonstatutory aggravating circumstance."

Without question, the facts and circumstances of the burning of an elderly victim are an integral part of the specified aggravating offense of murder in the course of robbery and burglary. Thus, we agree with the court of appeals that any error the trial panel may have committed in using the particular language it did was harmless beyond a reasonable doubt.

Lott also asserts that the trial court gave no weight to mitigating factors and did not explain why the aggravating circumstance outweighed any mitigating factors. The trial court found the evidence did not establish any mitigating factors under R.C. 2929.04(B). It logically follows that, since the court found no mitigating factors, it concluded that the aggravating circumstance outweighed any mitigation. *See State v. Byrd, supra*, at 85, 512 N.E. 2d at 618-619; *State v. Post, supra*, at 389, 513 N.E. 2d at 764.

We stated in *State v. Post, supra*, that

"* * * Although R.C. 2929.04(B) requires a trial court or three-judge panel to consider the factors enumerated therein, '* * * it does not require that court or panel to find that such evidence establishes a mitigating factor or factors.' (Emphasis added.) *State v. Stumpf* (1987), 32 Ohio St. 3d 95, 101, 512 N.E. 2d 598, 605. *See*, also, *State v. Steffen* (1987), 31 Ohio St. 3d 111, 129, 31 OBR 273, 289, 509 N.E. 2d 383, 399." *Id.*

In fact, the assessment and weight to be given mitigating evidence are matters for the trial court's determination. *State v. Steffen, supra*, at paragraph two of the syllabus. However, to meet the statutory mandate of R.C. 2929.03(F), the trial

court in this case should have more explicitly analyzed the mitigating evidence the defense presented, particularly that evidence relevant to "other factors" under R.C. 2929.04(B)(7). While unquestionably the sentencing panel should have conducted this more explicit analysis, whatever error that may have been committed in that panel's analysis has been rectified by our independent reweighing of the aggravating circumstance against any mitigating factors (*see Clemons v. Mississippi, supra*), which we discuss below.

R.C. 2929.04(B)(3) allows the defendant to present evidence that "* * * at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law * * *." In propositions XII and XV, Lott asserts that the prosecution was allowed to improperly rebut the defense's mitigation evidence of mental disease or defect and that, as stated, the sentencing panel did not weigh proved mitigating factors.

In attempting to establish the defendant's impaired mental capacity, defense counsel called two psychologists who expressed opinions about Lott's drug dependency on marijuana or alcohol, with one psychologist, Dr. James Eisenberg, characterizing drug dependency as a mental defect. The state rebutted this defense evidence through the testimony of three witnesses. One, Detective James Copeland of the East Cleveland Police Department, had interviewed Lott on July 11, 1986, several days before the offense. Detective Copeland testified that Lott exhibited no signs of alcohol or drug usage on that day. Another was Lott's probation officer, Maria Nemec, a trained alcohol counselor, who observed Lott twice weekly from May 23 until the end of July 1986. She also had Lott's urine checked for drugs and saw no sign of Lott's using drugs, although evidence of codeine from a cough syrup prescription was discovered in

June. Lastly, Jeanette Zebris, the head nurse of a chemical dependency unit at Southwest General Hospital, had interviewed Lott on July 29 and testified that she found Lott was not addicted to drugs, although she stated that he did abuse them. Zebris based this testimony upon Lott's written answers to an intake assessment form and upon her observations of Lott.

The trial court properly admitted the state's rebuttal evidence on possible alcohol and drug abuse, since the defense first put forward evidence which it characterized as showing such abuse. We note that neither side claimed or offered any evidence that Lott was intoxicated at the time of the offense. Based upon our independent reweighing of this evidence, we find that the state adequately rebutted Lott's claims of alcohol and drug dependency. Thus, while the sentencing panel should have more explicitly addressed this evidence regarding alcohol and drug abuse, we find no error in that panel's failure to consider such evidence to be a mitigating factor under R.C. 2929.04(B)(3).

The sentencing panel could also have addressed evidence of Lott's intelligence as a possible mitigating factor under R.C. 2929.04(B)(3). Tests indicated Lott's intelligence quotient ranged in the low average categories, with "I.Q." tests yielding results of 77-81, 83-91, and 87-97. Also the panel could have more directly discussed Lott's age of twenty-five as relevant to the mitigating factor of "[t]he youth of the offender * * *" with reference to Lott's limited development and deprived childhood. (R.C. 2929.04[B][4].) Again, however, any error committed in not expressly analyzing this evidence in sentencing has been corrected by this court's independent appellate reweighing.

The sentencing panel should also have been more explicit in its analysis of Lott's "* * * history, character, and background * * *" (R.C. 2929.04[B]) and in its analysis of

"other factors" under R.C. 2929.04(B)(7). Specifically, the defense presented evidence that Lott studied diligently and was progressing well toward obtaining a G.E.D. equivalency certificate while awaiting trial, and that Lott's abilities to express himself have improved. Previously, Lott exhibited poor academic performance in school. While our review of the evidence does not support the defense's contention that Lott was dependent on alcohol or marijuana, it is evident alcohol and drug abuse did contribute to his problems. Lott did manage to work for several months at a part-time job in a supermarket; however, he worked very little after April 1986.

Psychologist James Eisenberg characterized Lott as a loner, with low self-esteem and feelings of inferiority, and with a passive dependent personality. Lott blamed his troubles on alcohol and drugs, on lack of parental guidance or support, and on his father's leaving home. Lott stated he was never in trouble as a juvenile, felt depressed and "bad" about the situation, and prayed for McGrath and himself.

On the other hand, our independent review indicates that the trial court was correct in finding that Lott had failed to prove by sufficient evidence the mitigating factors of victim inducement (R.C. 2929.04[B][1]), duress (R.C. 2929.04[B][2]), or Lott's involvement in a capacity other than as the principal offender (R.C. 2929.04[B][6]). Lott's prior convictions in 1984 for burglary and robbery make the R.C. 2929.04(B)(5) factor of "* * * the offender's lack of a significant history of prior criminal convictions and delinquency adjudications * * *" inapplicable to Lott's case. Indeed, Lott was on probation when he committed this act.

The nature and circumstances of the offense (R.C. 2929.04[B]) offer nothing to mitigate the aggravating circumstance of this crime. Unquestionably, attacking and killing an eighty-two-year-old victim in his home by pouring flammable oil on him, setting him ablaze, and then

abandoning the victim to his fate is an absolutely heinous act. Thus, based upon our independent reweighing of the aggravating circumstance against any mitigating factors in this case, *Clemons v. Mississippi, supra*, we conclude that the proved aggravating circumstance of robbery and burglary outweighs any mitigating factors beyond a reasonable doubt. R.C. 2929.04(B).

X

Prosecutorial Misconduct—Sentencing

In proposition XI, Lott asserts that the prosecutor committed misconduct at the sentencing phase of his trial. Lott argues that the prosecutor injected nonstatutory aggravating circumstances and inadmissible "other acts" discussed above, in addition to denigrating the defense.

In a pre-mitigation hearing motion, defense counsel asked the prosecutor to disclose information regarding aggravating circumstances and mitigating factors. The prosecution responded by providing information including indictments pending against Lott, allegedly relevant to the statutory mitigating factor, R.C. 2929.04(B)(5), "* * * lack of a significant history of prior criminal convictions and delinquency adjudications * * *." In providing this information the prosecutor attempted to put irrelevant information before the court, since only convictions, not pending indictments, are relevant to R.C. 2929.04(B)(5).

The prosecutor also attempted to introduce testimony of the victims of these alleged offenses, for which Lott had been indicted but not convicted. However, the court declined to admit this testimony or hear a proffer of its content. As we discussed earlier, Lott asserts the prosecutor attempted to introduce evidence of these crimes, together with Lott's lack of remorse and the violent nature of his acts, as non-statutory

aggravating circumstances. Lott also argues the prosecution improperly commented that defense counsel developed the mitigation strategy allegedly without a proper regard for the facts.

While there was some degree of improper conduct by the prosecutor, Lott failed to establish how this conduct prejudicially affected his substantial rights. *State v. Smith, supra*, at 14-15, 14 OBR at 318-319, 470 N.E. 2d at 885-886. Our focus on review should be on "* * * the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1981), 455 U.S. 209, 219, certiorari denied (1984), 465 U.S. 1027. As to revealing the other pending indictments, defense counsel withdrew and the court never ruled on the defense disclosure motion. Also, the trial panel already knew of the other pending indictments and was careful to avoid admitting evidence about other indictments pending against Lott.

The prosecution is entitled to challenge defense mitigation evidence by cross-examination or rebuttal. *State v. DePew* (1988), 38 Ohio St. 3d 275, 286-287, 528 N.E. 2d 542, 555, certiorari denied (1989), 489 U.S. 103 L. Ed. 2d 241, 109 S. Ct. 1099. Also, defense counsel generally failed to object to the prosecutor's improper remarks and so, without a showing of plain error, waived the right to challenge these remarks on appeal. *State v. Ferrette* (1985), 18 Ohio St. 3d 106, 18 OBR 139, 480 N.E. 2d 399; *State v. Williams, supra; State v. Gordon* (1971), 28 Ohio St. 2d 45, 57 O.O. 2d 180, 276 N.E. 2d 243. Thus, we find that any misconduct by the prosecutor did not substantially infringe upon Lott's substantive rights. *State v. Smith, supra.*

XI

Ineffective Assistance of Counsel

In proposition XIII, Lott asserts he was deprived of the effective assistance of counsel, in violation of his Sixth Amendment rights. He asserts error in the following areas: defense counsel's failure to move to suppress evidence of an eyewitness identification; defense counsel's failure to object to joinder of the 1983 burglary and theft offenses (see our discussion of proposition I); defense counsel's failure to object to admission of evidence of the lamp oil and telephone cord (see our discussion of proposition II); defense counsel's failure to object to prosecutorial misconduct (see our discussion of propositions III, IV and X); and in other tactical decisions of defense counsel during the guilt and sentencing phases of Lott's trial.

A reversal based upon a claim of ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced his defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687. This court has held that a properly licensed attorney is presumed competent. *State v. Smith* (1985), 17 Ohio St. 3d 98, 100, 17 OBR 219, 221, 477 N.E. 2d 1128, 1131, citing *Vaughn v. Maxwell* (1965), 2 Ohio St. 2d 299, 301, 31 O.O. 2d 567, 568, 209 N.E. 2d 164, 166. "Thus, the burden of proving ineffectiveness is on the defendant." *State v. Smith* (1985), *supra*.

Lott claims defense counsel should have moved to suppress Coleman's eyewitness identification of Lott. However, Lott has not demonstrated that the trial court would have granted such a motion. Indeed Coleman had several opportunities to observe Lott, whose suspicious actions drew Coleman's attention. She called the police twice and, as a trained artist, even sketched Lott's face. Coleman identified Lott from a photo array conducted on July 28, before Lott's arrest. Further, Coleman described a red and black running suit Lott was wearing, which was later found in Lott's car.

To suppress identification testimony, there must be "* * * a very substantial likelihood of irreparable misidentification." *Simmons v. United States* (1968), 390 U.S. 377, 384. The focus, under the "totality of the circumstances," is upon the reliability of the identification, not the identification procedures. *Manson v. Brathwaite* (1977), 432 U.S. 98, 113. (Accord *Neil v. Biggers* [1972], 409 U.S. 188, 196-197; *State v. Moody* [1978], 55 Ohio St. 2d 64, 9 O.O. 3d 71, 377 N.E. 2d 1008.) Any discrepancies between the police officers' and Coleman's testimony do not indicate suggestive identification techniques. Nor does Lott refute the underlying facts supporting the identification's reliability. Therefore, defense counsel's motion to suppress the identification would have been futile and thus Lott has no sound basis to assert ineffective assistance here.

As we discussed when dealing with propositions I and II, counsel need not have objected to the joinder of the 1983 offenses or to the admission of evidence concerning the lamp oil and telephone cord, respectively. As we discussed when dealing with propositions III, IV and XI, defense counsel's failure to object to unwarranted prosecutorial remarks breached no essential duty, since Lott's substantive rights were not prejudiced thereby. Nor did defense counsel's decision to defer a suppression hearing until during the trial breach Lott's substantive rights, since the court did in fact suppress the statement at issue from evidence.

Lott asserts that his right to effective assistance of counsel was also denied when defense counsel did not move for a new trial or to reopen the trial after new allegedly exculpatory evidence was discovered during the sentencing phase of the trial. This evidence simply established that Lott's fingerprints were not found on McGrath's car. The mere absence of Lott's fingerprints does not refute evidence admitted at trial and is therefore not exculpatory. Neither was

this evidence "newly discovered," since Lott failed to establish that defense counsel was newly made aware of this evidence or could not with reasonable diligence have discovered this evidence before trial began. Crim. R. 33(A)(6). Clearly, the trial court would not have granted motions for a new trial or to reopen the trial on the basis of the absence of Lott's fingerprints in McGrath's car. Thus there was no prejudice to Lott's rights and his Sixth Amendment guarantees were preserved. *Strickland v. Washington, supra.*

Lott argues that defense counsel breached Lott's right to effective assistance of counsel when defense counsel did not object to admitting a presentence investigation report into evidence that also contained McGrath's hearsay statement to the East Cleveland Police Department. In that statement, McGrath told the police that earlier a man had broken into his home, beaten him, set him on fire, and stolen his money and his 1982 Ford Escort.

Prior to the sentencing phase of the trial, Lott requested a presentence investigation and a psychiatric evaluation, as provided by R.C. 2929.03(D)(1). That section further provides that once a presentence report is made, copies "* * * shall be furnished to the court * * *." *See State v. Buell* (1986), 22 Ohio St. 3d 124, 138, 22 OBR 203, 215, 489 N.E. 2d 795, 808, certiorari denied (1986), 479 U.S. 871. Defense counsel's objection to the panel's receipt of the presentence investigation report would have been for naught. It is also noted that the trial panel had before it McGrath's hearsay statements contained within the medical reports the prosecutor sought to introduce into evidence and later incorporated into the presentence investigation report. Because the sentencing panel had the right under R.C. 2929.03(D)(1) to receive Lott's presentence investigation report, and because we presume a trial panel so scrupulous to avoid admitting improper evidence at trial would not later

have relied upon that excluded evidence in imposing its sentence, *State v. Post, supra*, at 384, 513 N.E. 2d at 759, we conclude that Lott's arguments regarding ineffective assistance of counsel are without merit.

XII

Proportionality Review

In proposition XVI, Lott argues his sentence of death is excessive and disproportionate compared to similar cases. To support his proposition, Lott presents the same mitigating factors he failed to prove during the sentencing phase and which we have independently reviewed and rejected.

Lott also argues his crimes were less heinous than other aggravated murders, particularly those committed by the offenders in *State v. Martin* (1985), 19 Ohio St. 3d 122, 19 OBR 330, 483 N.E. 2d 1157, certiorari denied (1986), 474 U.S. 1073, and in *State v. Williams* (1986), 23 Ohio St. 3d 16, 23 OBR 13, 490 N.E. 2d 906, certiorari denied (1987), 480 U.S. 923. Lott is correct in asserting that the acts of the offender in *Williams* (1986), *supra*, who shot an elderly woman in the head, and of the offender in *Martin, supra*, who shot his victim, who was less than two feet away, involved brutal and heinous acts directly causing the victims' deaths. Clearly, however, Lott's vicious acts of burgling and robbing, setting on fire, and then abandoning a helpless eighty-two-year-old who lived alone are equally as heinous and direct as the acts committed in *Williams, supra*, and in *Martin, supra*.

Lott also argues that the circumstances and the nature of his offense demand a less severe penalty than that of death, as imposed on the offender in *State v. Mapes* (1985), 19 Ohio St. 3d 108, 19 OBR 318, 484 N.E. 2d 140, certiorari denied (1986), 476 U.S. 1178. *Mapes* involved the trial court's

finding the offender guilty of a prior murder specification under R.C. 2929.04(A)(5), since the court in *Mapes* had previously received a judgment of conviction of murder from a New Jersey court, entered upon *Mapes's* plea of non vult. *Id.* at 110, 19 OBR at 319-320, 484 N.E. 2d at 143. Thus, the defendant in *Mapes, supra*, was convicted under R.C. 2929.04(A)(5) for a killing where the offender was guilty of a previous purposeful killing or attempt to kill. Lott, on the other hand, was convicted under R.C. 2929.04(A)(7) for a killing in the course of aggravated burglary and aggravated robbery. Thus, we find the facts and circumstances in *Mapes, supra*, to be inapplicable to this case.

After conducting a proportionality review and comparing Lott's case with other robbery-murder cases, we find that Lott's death sentence is proportionate and not excessive. *See State v. Tyler* (1990), 50 Ohio St. 3d 24, 553 N.E. 2d 576; *State v. Clark* (1988), 38 Ohio St. 3d 252, 527 N.E. 2d 844, certiorari denied (1989), 489 U.S , 103 L. Ed. 2d 823, 109 S. Ct. 1355; *State v. Post, supra*; *State v. Scott* (1986), 26 Ohio St. 3d 92, 26 OBR 79, 497 N.E. 2d 55, certiorari denied (1987), 480 U.S. 923; *State v. Martin, supra*.

Accordingly, appellant's convictions and sentence are affirmed.

Judgment affirmed.

APPENDIX J

Constitutional Provisions

The Due Process Clause of the Fourteenth Amendment provides:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX K

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

History: (June 25, 1948, ch 646, § 1, 62 Stat. 944; May 24, 1949, ch 139, § 90, 63 Stat. 102.)

APPENDIX L

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed
(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, underlying offense.
(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D)The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
(E)The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.
(4)A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
(A)the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B)the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C)the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has

been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D)the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

History: (June 25, 1948, ch 646, § 1, 62 Stat. 967; Nov. 2, 1966, P.L. 89-711, § 2, 80 Stat. 1105; April 24, 1996, P.L. 104-132, Title I, § 104, 110 Stat. 1218.)

APPENDIX M

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in Violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a court shall not be granted unless it appears that—
(A) the applicant has exhausted the remedies available in the courts of the State; or
(B) (i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,

as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
(A) the claim relies on—
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly

certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254

History: (June 25, 1948, ch 646, § 1, 62 Stat. 967; Nov. 2, 1966, P.L. 89-711, § 2, 80 Stat. 1105; April 24, 1996, P.L. 104-132, Title I, § 104, 110 Stat. 1218.)

APPENDIX N

Ohio Rev. Code Ann. 2903.01. Aggravated murder.

[as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981]

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a

common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

APPENDIX O

Federal Rule of Evidence 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

History:(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1933.)

APPENDIX P

Rules Governing § 2254 Cases, Rule 6

(a) Leave of court required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) Requesting discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(c) Deposition expenses. If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

History: (As amended Dec. 1, 2004.)

APPENDIX Q

Federal Rule of Civil Procedure 26. General Provisions Governing Discovery; Duty of Disclosure

* * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of

the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a

certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

History: (Amended March 19, 1948; July 1, 1963; July 1 1966; July 1, 1970; Aug. 1, 1980; Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993.) (As amended Dec. 1, 2000.)

(4)

No. 05-962

In the Supreme Court of the United States

MARK HOUK, Warden,

Petitioner,

v.

GREGORY LOTT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Does Schlup v. Delo, 513 U.S. 298 (1995), require habeas petitioners who assert innocence after a constitutionally tainted trial to waive attorney-client privilege and work-product protections, thus permitting opposing counsel to depose the habeas petitioner's previous counsel and obtain their files to look for facts that might help them defend against the innocence claim?

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1. STATEMENT OF THE CASE.

The Sixth Circuit stopped enforcement of a privilege-piercing discovery order, finding that "the District Court applie[d] implied waiver in a completely new context." Petitioner's App. p. 14. The appellate court determined that, "There is no way to affirm the District Court's ruling without abandoning centuries of jurisprudence concerning the scope of the attorney-client privilege and endangering the full and frank communication between clients and attorneys." Petitioner's App. p. 18.

The discovery order completely exposed privileged material. "The District Court authorized the warden to depose and seek production of documents from Lott's trial counsel. Specifically, the Court ruled that Lott's trial counsel must provide any relevant information he has concerning whether Lott is guilty of the murder and whether Lott confessed the murder to the police." Petitioner's App. p. 2.

The facts underlying the Sixth Circuit's privilege-protecting mandamus order arise from Lott's successor habeas claim that he is innocent based on facts hidden at trial in violation of Brady v. Maryland, 373 U.S. 83 (1963). The Sixth Circuit granted Lott's application to file a successor habeas petition, finding that "Lott has made a prima facie showing that the prosecutor in his original trial both withheld important evidence from the court and made statements to the court that were directly contradicted by the evidence withheld from the defendant." Petitioner's App. p. 2. The court concluded its decision granting Lott's successor habeas application by saying:

> Taking the evidence as a whole, we conclude that petitioner's application makes a prima facie showing of constitutional Brady error that, if proved in the district court, may be sufficient to cause the fact finder to reach the conclusion beyond a

> reasonable doubt that the petitioner was not guilty of premeditatedly murdering the victim.
>
> Obviously, the egregious prosecutorial misconduct alleged here, if proved, must be deterred. So long as we value the rule of law, such conduct, if it occurred, cannot be tolerated in any kind of case -- much less in death penalty cases.

Petitioner's App. pp. 87-88.

The central Brady facts at issue in Lott's successor habeas include:

> Lott looks nothing like the very light complected, long straight-haired black man described by the victim as being his assailant, Respondent's App. pp. 48-49, 50-51, 67-68;
>
> The victim told police that he recognized his assailant from his barber shop, which was never disclosed to trial-level defense counsel – neither they nor, as far as Lott knows, the prosecution ever investigated this lead, Respondent's App. p. 69;
>
> Lott looks significantly different than the man drawn in a sketch by a key State witness, who years later admitted under oath (during a first-habeas deposition) that police fed her false information about phantom skin-lightening makeup to shore up her weak identification, Respondent's App. pp. 50-56, 87; and
>
> The victim did have reason to have lamp oil in his house, which exposes the prosecutor's false argument at trial that the perpetrator brought flammable liquid into the crime scene for the purpose of burning the victim, Respondent's App. pp. 49-50, 70, 77-86.

Additionally, Lott contends that a detective neither reliably nor credibly testified about an inculpating statement he claimed Lott made. The trial court suppressed the alleged confession because the detective violated Lott's Sixth Amendment right to counsel.

The district court granted discovery on the premise that Lott's innocence claim, based on facts withheld from him at trial in violation of Brady v. Maryland operated as an implied waiver of attorney-client privilege and work-product protections. Based on this unparalleled "implied waiver" analysis, the district court's discovery order stripped Lott of his attorney-client and work-product privileges. The order had six provisions implicating privilege:

(1) opposing counsel could depose Lott's trial counsel to ask what Lott said about the charged crimes and his interrogation, Petitioner's App. pp. 44-45;

(2) opposing counsel could depose Lott's first State post-conviction counsel to ask when he obtained law enforcement documents revealing Brady facts, and why he did not bring those facts to the State court's attention, Petitioner's App. p. 56;

(3) opposing counsel could depose Lott's first habeas counsel to ask why he did not include an innocence claim in Lott's first habeas petition, Petitioner's App. p. 56;

(4) opposing counsel could depose Lott to ask whether his trial lawyers had the Brady evidence, whether he was innocent, and what happened when he was interrogated, and, because Lott retained his Fifth Amendment rights, the court would "draw an adverse inference against him" if he exercised those rights during his deposition, Petitioner's App. pp. 53-54;

(5) Lott's successor habeas counsel had to give opposing counsel copies of any documents in Lott's trial counsel's file and Lott's first post-conviction counsel's file that contained "any information pertaining to Lott's actual innocence and Brady claims," and they "may not assert attorney-client privilege as grounds for withholding any documents related to Lott's culpability in McGrath's murder," Petitioner's App. pp. 57-58; and

(6) the custodian of deceased trial counsel Guiliani's records had to give the court any Lott-related files so the court could "conduct an *in camera* inspection of these documents and relinquish to the Petitioner any documents responsive to her request" to discover "information related to defending Lott's actual innocence and Brady claims." Petitioner's App. pp. 46-47.

Lott recognizes that his prior counsel would not be shielded from answering questions regarding the matters discussed in two affidavits regarding prior counsel that Lott tendered in support of his successor habeas petition. Respondent's App. pp. 71-72, 89-96. Lott agrees that his trial counsel could be deposed to determine whether the trial prosecutor disclosed the Brady evidence, Respondent's App. pp. 89-96 (Affidavit of Lott's trial counsel Jim Kersey, which Lott offered through Rule 7 in the district court, but its admission was denied when the order issued authorizing Kersey's deposition (see Petitioner's App. p. 62)). And Lott agrees that his first state post-conviction counsel could be deposed regarding when he obtained Brady evidence in

documents disclosed by the prosecuting and police agencies in response to public records requests made under Ohio law. See Respondent's App. 71-72. Lott also agrees that his privileges with respect to his first post-conviction are waived for the limited purpose of questioning first post-conviction counsel about the matters addressed in an affidavit submitted as an exhibit to his successor habeas petition; specifically, what legal rationale explains his decision not to present the facts in those records to an Ohio court. Id.

The Sixth Circuit found no justification for the privilege-piercing discovery order. It granted mandamus relief and "set aside those portions of the District Court's order which hold that Lott's assertion of actual innocence effects an implied waiver of the attorney-client privilege and those portions of the order directing discovery in accordance with that holding." Petitioner's App. p. 18.

2. REASONS FOR DECLINING JURISDICTION.

Privilege law is settled law.[1] The Sixth Circuit simply applied that law to correct a district court which departed from the usual course of centuries old privilege jurisprudence. Petitioner would have this Court reinstate a discovery order that reached the novel and unjustified conclusion that Lott's innocence claim cost him his attorney-client privilege and work-product protections.

The Sixth Circuit stopped the order's intrusion into territory both parties agree is privileged, correctly concluding that there was no justification for the discovery order's total breach of Lott's privileges.

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[1] For brevity, unless otherwise distinguished, Lott uses "privilege" to refer to both the attorney-client privilege and the work-product protection doctrine. As noted by the Sixth Circuit, "While our decision is couched in terms of the attorney-client privilege, it applies with equal force to the work product privilege. See Upjohn Co. v. United States, 449 U.S. 383, 400 (1981); Bittaker v. Woodford, 331 F.3d 715, 722 n.6 (9th Cir. 2003)." Petitioner's App. p. 3 n.1.

The district court's discovery order found an implied privilege waiver where none existed. Lott's claim that he is innocent under Schlup v. Delo, 513 U.S. 298 (1995), based on facts withheld from him at trial in violation of Brady v. Maryland, 373 U.S. 83 (1963), did not operate as an implied waiver of attorney-client or work-product privileges. Lott relies on Schlup, not Herrera v. Collins, 506 U.S. 390 (1993), to advance this claim because he had a constitutionally tainted trial. Petitioner's Question Presented misdirects the Court by relying in part on Herrera, which is not at issue in this case.

Neither Lott's claim nor his arguments in support put privileged matters at issue in such a way as to justify the privilege-piercing discovery order. He did not argue ineffective assistance of counsel. Nonetheless, the district court illogically likened Lott's Brady-innocence claim to an ineffective assistance of counsel claim in order to find an implied waiver where none exists. Petitioner's App. pp. 44-45.

Petitioner's four-part argument asks this Court to reinstate the district court's wayward discovery order. Petitioner's varied arguments advance two main contentions. First, because Lott's privileged information is probably relevant and might contain facts helpful to defend against an innocence claim, Petitioner is entitled to sort through Lott's privileged information. Second, Schlup silently created an exception to centuries old privilege law by allowing the government to fish through a habeas petitioner's privileged information whenever a Schlup-based innocence claim is raised.[2]

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[2] "By freeing district courts of the strictures of the rules of admissibility, the Schlup Court makes no suggestion that courts are likewise unbound by the rules of privilege. It can hardly be said that the Court would take such a large leap silently. The distinction between admissibility and privilege is no stranger to the Supreme Court or any other. Suspending the rules of admissibility while preserving the rules of privilege is not an unusual event." Petitioner's App. p. 16.

Petitioner is wrong on both counts. No court or party to this litigation has found a similar privilege-piercing discovery order; nor is there a case like the Sixth Circuit's order. It appears that no other circuit has ever been faced with a district court order that departed so radically from established privilege law. The Sixth Circuit reached the right decision. There is no reason for this Court to review the appellate court's routine application of settled privilege law to resolve a fact-intensive discovery dispute.

2.1 THERE IS NO SUPPORT IN DOCTRINE OR HISTORY FOR PETITIONER'S NOVEL CONTENTION THAT A HABEAS PETITIONER PURSUING AN INNOCENCE CLAIM INVOLVING SCHLUP IMPLICITLY AND COMPLETELY WAIVES ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION.

Given the settled history of privilege jurisprudence, the Sixth Circuit correctly quashed an aberrant discovery order that found a complete privilege waiver rooted solely in the fact Lott invoked Schlup to support his successor habeas innocence claim filed pursuant to 28 U.S.C. § 2244(b). Petitioner's arguments invite this Court to create a broad waiver of attorney-client privilege and work-product protection whenever a habeas petitioner asserts a claim of innocence. This position cannot be justified by the long-standing policies that undergird the rights of clients to converse freely with their attorneys; nor can it be supported by the well-developed doctrine of waiver of privilege. Accordingly, this Court should decline certiorari.

The Sixth Circuit used long settled law to reign in the privilege-piercing discovery order:

> The oldest of the privileges, the attorney-client privilege has been recognized since the reign of Queen Elizabeth. See, e.g., Hartford v. Lee, 21 Eng. Rep. 34 (Ch. 1577). And, as Wigmore notes, the privilege was virtually "unquestioned" even then. 8 J. Wigmore, Evidence § 2290, at 547 (3d ed. 1940). The attorney-client privilege encourages "'full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and the administration of justice.'" Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). As we have previously noted, "the privilege encourages clients to make full disclosure to their lawyers, and '[a] fully informed lawyer can more effectively serve his client.'" Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998).

Petitioner's App. p. 6.

Similarly, work product protection stems from an understanding that the "historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests" demands that an attorney "prepare his legal theories and plan his strategy without undue and needless interference." Hickman v. Taylor, 329 U.S. 495, 511 (1947). Work-product is protected by Fed. R. Civ. P. 26(b), which neither the district court in its discovery order nor Petitioner in its certiorari petition cited, much less applied, to this case.[3]

"It is not hyperbole to suggest that the attorney-client privilege is a necessary foundation for the adversarial system of justice." Sixth Circuit Opinion, Petitioner's App. pp. 6-7. Petitioner's argument that privileges do not apply to innocence claims based on Schlup assaults the adversarial axiom underlying our justice system. "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth -- as well as fairness -- is 'best discovered by powerful statements on both sides of the question.'" Penson v. Ohio, 488 U.S. 75, 84 (1988) (citations omitted).

Petitioner is free to do what he can to muster "powerful statements" for his current cause. But the fact that Petitioner is cornered by the trial prosecutor's flagrant Brady violations does not vest him with the right to fish through Lott's privileged information in the hope he will find

[3] "The Rules of Civil Procedure define the scope of discovery as follows: 'Parties may obtain discovery regarding any mater, *not privileged*, that is relevant to the claim or defense of any party . . . .' Fed. R. Civ. P. 26(b)(1) (emphasis added). The Rules make clear that privileged material, even relevant privileged material, is not discoverable. There are no exceptions to these rules that would permit the discovery of privileged materials in this habeas proceeding." Sixth Circuit Opinion, Petitioner's App. p. 11.

something to fill in the gaping Brady hole. If Petitioner cannot find a way to fight Lott's claim without fishing through Lott's privileged information, that is because his case is weak, not because he has a lawful right to pierce privilege.

Barring Petitioner from accessing Lott's privileged information hardly empties his arsenal. By his own argument, Petitioner has facts and law to contest Lott's successor habeas claim. Without conceding the correctness of Petitioner's arguments, Lott notes that throughout his certiorari petition, Petitioner points to facts he believes refute Lott's innocence claim. Petitioner has access to the trial record; to the investigatory materials relied upon at Lott's criminal trial; and to the evidence Lott puts forth to assert his claim of innocence. All of this is standard fare when courts adjudicate a habeas argument that Schlup's innocence gateway excuses a defaulted claim. See e.g., Calderon v. Thompson, 523 U.S. 538, 560-66 (1998); Souter v. Jones, 395 F.3d 577, 592 (6th Cir. 2005); Hubbard v. Pinchak, 378 F.3d 333, 340 (3d Cir. 2004); United States v. Cervini, 379 F.3d 987, 992 (9th Cir. 2004); United States ex rel. Bell v. Pierson, 267 F.3d 544, 553-54 (7th Cir. 2001). If Petitioner thinks that these facts cannot counter those Lott found after his trial, that is because Petitioner's case now looks weak, with gaps exposed by the Brady material. Being in a difficult spot has never been a reason to permit a party to fish through his opponent's privilege information.

What Petitioner is really saying is that the evidence he has is not enough to contest Lott's claim. What Petitioner wants is a chance to pierce privilege to fish for a way around the Brady evidence that points to some other perpetrator; that would excuse the fact that the police coerced an eyewitness; that would forgive the fact that the trial prosecutor lied about the lamp oil; and that would overcome the lead detective's unreliable claim that Lott partially confessed. Ours

would be a very different judicial system if every advocate put in a tough spot by the evidence had a right to force open opposing counsel's files.

2.2 NEITHER LOTT'S SUCCESSOR HABEAS CLAIM NOR SCHLUP PUTS LOTT'S PRIVILEGED INFORMATION IN PLAY.

Petitioner argues that Schlup's rationale contains a silent conclusion that privilege law is breached when a habeas petitioner asserts innocence. The Sixth Circuit rejected this broad interpretation. "To be certain, the Schlup Court indicates that the rules of admissibility do not limit the evidence that can be considered by a court evaluating a claim of actual innocence. ... [But by] freeing district courts of the strictures of the rules of admissibility, the Schlup Court makes no suggestion that courts are likewise unbound by the rules of privilege." Petitioner's App. p. 16. The court distinguished privileged information from other information that, while its disclosure may be required, cannot be admitted against the disclosing party. "Privileged communications are not merely withheld from admission against the holder. Instead, the privilege operates to prevent the disclosure itself. In that way, privileges can be distinguished from other rules of admissibility...." Petitioner's App. p. 9 (citation omitted). The Sixth Circuit went on to say:

> There is no question that the attorney-client privilege remains applicable in habeas proceedings. "The rule with respect to privileges applies at *all* stages of *all* actions, cases, and proceedings." Fed. R. Evid. 1101(c) (emphasis added). The Rules of Evidence make it abundantly clear that the attorney-client privilege stands in all federal judicial proceedings, which would include habeas proceedings where petitioners assert actual innocence. The commentators make clear that the applicability of the privilege rules in all proceedings "means that privileges can apply even in situations where the other rules of evidence are not applicable." 31 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 8076, at 618 (2000); see also id. at 614 ("The policy behind extending privilege law to all proceedings is that the values protected by privileges can be destroyed by permitting disclosure of privileged material in any judicial context.").

Petitioner's App. p. 10.

Petitioner's reading of Schlup is novel and wrong. But for the district court below, it appears that no other court has found that Schlup calls for a complete abandonment of privileges. Neither party nor any court involved in this litigation found a case where a court allowed attorney-client privilege to be pierced so that the State could look for information to rebut an innocence claim. Only a few courts have even considered any evidence put forth by the State that was outside of the record. In those cases, the evidence had not been ruled inadmissible under federal standards, like the privileged information at issue here should be.

In United States v. Bousley, 523 U.S. 614 (1998), this Court remanded to allow a petitioner to make a showing of innocence to avoid procedural default, saying that "the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy...." Bousley, 523 U.S. at 624. Bousley cannot be read to support Petitioner's contention that the government can pierce privilege to fish for evidence of guilt.

In Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004), the court considered hearsay evidence while analyzing an actual innocence claim without determining whether it would have been admissible at trial. Doe, 391 F.3d at 170. The court reasoned that Schlup permitted reviewing courts to examine all the evidence in the record, including evidence that might have been inadmissible at trial. Doe, 391 F.3d at 161-62. However, the court specifically found that the evidence at issue was reliable, and was the result of the investigation that resulted in Doe's conviction. Doe, 391 F.3d at 170.

The dissenting opinion in Doe took issue with the majority's contention that it could consider inadmissible evidence when evaluating a claim of actual innocence. Doe, 391 F.3d at 181-82 (Pooler, J., dissenting). Reading Schlup and Bousley together, the dissent reasoned that

the court should consider only admissible evidence when determining actual innocence cases. Doe, 391 F.3d at 181.

Even where a court has considered suppressed evidence when addressing an actual innocence claim, the evidence had been suppressed only on state law grounds and would have been admissible under federal law. Hamilton v. Miller, 292 F. Supp. 2d 437, 441-42 (E.D.N.Y. 2003). Petitioner's inculpatory statement had been suppressed because it was obtained in violation of New York law, although it did comply with federal standards. Hamilton, 292 F.3d at 441. However, even though the court noted that it could consider the suppressed statement, it also remarked that "[r]eliance on this evidence is, however, unnecessary in the instant case," and noted the "great weight of evidence against [Petitioner]" undermined his claim of actual innocence. Hamilton, 292 F.3d at 456.

While Doe and Hamilton sanctioned the use of evidence that may not have been admissible at trial, neither court relied on any evidence that had been obtained by the State after the petitioner had been convicted; and neither relied on evidence that would have been inadmissible under both federal and state law. Both federal and state law prohibit admitting privileged evidence.

Overall, the cases involving Schlup demonstrate a stable and reasonable application of this Court's decision. There are no controversies or conflicting opinions that support Petitioner's unique if not aberrant position; there are no problems that require this Court's attention.

This Court need not step in to solve a problem that does not exist.

2.3 ATTORNEY-CLIENT PRIVILEGE MAY BE IMPLICITLY WAIVED ONLY IN A NARROW SET OF CIRCUMSTANCES, NONE OF WHICH APPLIES HERE.

The Sixth Circuit found no basis for implying a waiver: "In the discovery order, the District Court did not rule that the attorney-client privilege was inapplicable. Instead, the District

Court found that through asserting a claim of innocence, Lott should be deemed to have 'waived' the privilege — clearly, a legal fiction if 'waiver' means a voluntary act." Petitioner's App. p. 11. The Sixth Circuit found "no case authority holding that a claim of actual innocence 'waives' the attorney-client privilege or similar privileges such as the doctor-patient and priest-penitent privilege." Petitioner's App. p. 1.

Lott did not claim ineffective assistance of counsel; he did not use privileged information as a sword to advance his claim. Lott's claim asserts innocence in the aftermath of a trial corrupted by Brady error. Lott contends that Schlup v. Delo, 513 U.S. 298 (1995), recognizes a cognizable claim of innocence based on a trial rendered unfair by constitutional error. The analytical focus should fall on the question whether, in light of the Brady evidence of innocence, any reasonable factfinder would have found Lott guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(B)(ii).

The Sixth Circuit correctly concluded that no waiver exception justifies the discovery Petitioner seeks:

> In this case, the District Court applies implied waiver in a completely new context. Rather than finding that Lott had put his attorney's performance or strategic decisions at issue and determining that he took the affirmative action to waive the privilege, the court finds waiver in Lott's assertion that the police invented the confession and in his assertion that he is innocent. Neither of Lott's assertions relate to what his attorney knew or did in this case. Instead, they are assertions about Lott's actions, i.e. whether he killed McGrath and whether he confessed to the killing to the police. We have not been able to discover a single case where a court has found that implied waiver applied in a similar fashion.

Petitioner's App. p. 14.

Under settled law, implied waivers are consistently construed narrowly. Courts in habeas proceedings "must impose a waiver no broader than needed to ensure the fairness of the proceedings before it." Bittaker v. Woodford, 331 F.3d 715, 720 (9th Cir. 2003). "A broad

waiver rule would no doubt inhibit the kind of frank attorney-client communications and vigorous investigation of all possible defenses that the attorney-client and work product privileges are designed to promote." Bittaker, 331 F.3d at 722. A broader waiver rule than the one Petitioner seeks cannot be imagined: once Schlup is invoked, all privilege protections fall by the wayside – nothing is out of bounds under Petitioner's definition of implied waiver.

There is no general principle that a litigant waives attorney-client privilege merely by asserting the correctness of his legal position. If such an exception existed, the privilege would be illusory during any litigation on the merits. To this end, courts have held that filing a complaint in Tax Court need not require taxpayers to disclose their attorneys' advice. See Bernardo v. Commissioner, 104 T.C. 677, 690-91 (1995). Litigants seeking to enforce contracts do not waive privilege, even though attorneys may have information as to the intended interpretation of contractual terms. See Uniroyal Chem. Co. v. Syngenta Crop Protection, 224 F.R.D. 53, 56 (D. Conn. 2004). And a criminal defendant does not waive privilege merely by denying criminal intent. United States v. White, 887 F.2d 267, 270 (D.C. Cir. 1989) ("A rule thus forfeiting the privilege upon denial of *mens rea* would deter individuals from consulting with their lawyers to ascertain the legality of contemplated actions; it would therefore undermine the animating purpose of the privilege."). These cases rest on a doctrinal tradition—the "at issue" doctrine– that privilege is implicitly waived only when a party makes the performance of his attorney a substantive issue in the case.

The rule providing for waiver when a litigant voluntarily injects his attorney's performance into a case has no application to the matter of Lott's innocence. The "at issue" doctrine exists because it would be unfair for a defendant to assert that his attorney's conduct immunizes him from liability without allowing his adversaries to know anything about that

conduct. Thus, as a number of courts have noted, privilege cannot be used "as both a sword and a shield." See, e.g., In re Keeper of Records, 348 F.3d 16, 24 (1st Cir. 2003); In re von Bulow, 828 F.2d 94, 103 (2nd Cir. 1987).

The majority approach for analyzing issue-injection waiver originated in Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (articulating a three-part test for determining whether a party put privileged information at issue). Courts utilizing the Hearn approach have found waiver in cases where a party asserted reliance on the advice of counsel, Conkling v. Turner, 883 F.2d 431, 434 (5th Cir. 1989); raised an affirmative defense of good faith, United States v. Bilzerian, 926 F.2d 1285, 1291-93 (2nd Cir. 1991); sought equitable tolling of the statute of limitations based on counsel's conduct, WLIG-TV Inc. v. Cablevision System Corp., 879 F. Supp. 229, 235 (E.D.N.Y. 1994); made a claim of misrepresentation, Synalloy Corp. v. Gray, 142 F.R.D. 266, 270 (D. Del. 1992); or accused an attorney of malpractice, Sedco Int'l S.A. v. Cory, 683 F.2d 1201, 1206 (8th Cir. 1982). In each of these cases, the communication between attorney and client was a critical component of the claim, and without access to the privileged communications the party's opponent would be left with no opportunity to defend against the claim.

Lott has not used his privileged information as a sword to advance his claim. Petitioner ignores the premise of the "at issue" doctrine, relying instead on the bare assertion that fishing through Lott's privileged information would advance his cause.

2.4 RELEVANCE ALONE DOES NOT JUSTIFY AN EXCEPTION TO LONGSTANDING PRIVILEGE PROTECTIONS.

Petitioner's refrain that accessing Lott's privileged material might yield information helpful to his case simply states the obvious without advancing the argument. In essence, Petitioner argues that privilege must be cast aside because (1) Lott has made innocence an issue

in the case; (2) his attorneys might know something about Lott's innocence; and (3) it could help Petitioner's case to find out what Lott's attorneys know and what is in their files.

Standing alone, the fact that opposing counsel may have relevant information for an adversary has never opened privileged information for inspection. Nonetheless, Petitioner's argument rests on the assertion that, because there might be useful facts protected by Lott's privileges, his privileges must yield. This argument flies in the face of established principles that this Court need not disturb.

As one court observed, "in every lawsuit, it would be useful and convenient for [one party] to obtain [the other's] privileged material . . . . But those are not reasons to void the attorney-client privilege." Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76, 81 (S.D.N.Y. 1986). Another court aptly noted: "While it would no doubt provide a tremendous tactical advantage to an adversary to be able to pry into the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,' Fed. R. Civ. P. 26(b)(3), a competent adversary will never need access to such [work-product] information in order to prepare and present his or her case effectively." KW Muth Co. v. Bing-Lear Mfg. Group, 219 F.R.D. 554, 565-66 (E.D. Mich. 2003) (quoting Fleet Nat'l Bank v. Tonneson & Co., 150 F.R.D. 10, 14-15 (D. Mass. 1993).

Unless a party uses privileged information as a sword to advance a claim – which Lott has not done – then the privilege remains a shield to his adversary's discovery requests no matter whether the protected information would be relevant. Bilzerian, 926 F.2d at 1292. And as the Sixth Circuit put it: "[W]hile the sword stays sheathed, the privilege stands." Petitioner's App. p. 14.

Petitioner assumes, as did the district court in the discovery order corrected by the Sixth Circuit, that the relevance of the evidence sought is dispositive on the issue of implied waiver. But as other courts have uniformly maintained:

> Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.
>
> As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served.

Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 864 (3rd Cir. 1994); accord THK America, Inc. v. NSK, Ltd., 917 F. Supp. 563, 567 (N.D. Ill. 1996) ("[T]he attorney-client privilege applies even when attorneys' opinions are relevant."); High Tech Commc'ns, Inc. v. Panasonic Co., 1995-1 Trade Cas. (CCH) ¶ 70,976, at 74,494 (E.D. La. 1995) ("[A]n otherwise privileged communication is not discoverable merely because it discloses facts relevant to the litigation."). These holdings are consistent with the policy goals guiding the law of privilege because "[a]ny inequity in terms of access to information is the price the system pays to maintain the integrity of the privilege." Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486, 1494 (9th Cir. 1989).

Under Petitioner's reasoning, the scenarios where lawyers could be forced to disclose otherwise confidential client communications are as broad as the concept of what constitutes relevant evidence. The mere fact that a client's communications with his attorney might contain information relevant to the claims being litigated has never been sufficient to cause a waiver of the attorney-client privilege. To the contrary, those communications regarding the subject of the litigation are precisely what the attorney-client privilege and the work-product doctrine are designed to protect.

2.5 WORK-PRODUCT PROTECTED INFORMATION MAY BE ACCESSED ONLY IN NARROW CIRCUMSTANCES, NONE OF WHICH APPLIES HERE.

Lott's trial and post-conviction counsels' files are work product that is protected from disclosure to his adversary by the work-product doctrine.

The work-product doctrine is governed by a uniform federal standard set forth in Fed. R. Civ. P. 26(b)(3) – a Rule never mentioned in the discovery order or Petitioner's petition for certiorari. This Rule shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." United States v. Nobles, 422 U.S. 225, 238 & n.11 (1975). Under Rule 26(b)(3), the work-product doctrine applies to "documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)...." Fed. R. Civ. P. 26(b)(3). It is therefore necessary that "the [work-product] doctrine protect materials prepared by agents of the attorney as well as those prepared by the attorney himself." Nobles, 422 U.S. at 238-39.

Under the work-product doctrine, a party seeking to obtain work-product materials must undertake several steps to justify before such protection is disregarded. Toledo Edison Co. v. G A Technologies, Inc., 847 F.2d 335 (6th Cir. 1988). First, the party seeking discovery bears the burden of showing that "the materials requested are 'relevant to the subject matter involved in the pending litigation' and not privileged." Toledo Edison, 847 F.2d at 339. Then, the party opposing discovery must show that the requested materials were "prepared in anticipation of litigation or for trial." Id. Once the materials have been shown to be work product:

> the burden shifts back to the requesting party to show that the requesting party (a) has substantial need of the materials in preparation of the party's case, and (b) that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In doing this, attention is directed at alternative means of acquiring the information that are less intrusive to the

> lawyer's work and whether or not the information might have been furnished in other ways.

Id. Even if the party seeking discovery can meet the "substantial need" and "undue hardship" tests, they still cannot access "opinion" work product, once the objecting party shows that the requested materials are the "mental impressions, conclusions, opinions or legal theories of an attorney or representative." Id.

Were Petitioner required to comply with these tests, he could not get around the obvious fact that documents recording client communications are privileged. The rest of the documents in prior counsels' files are work-product assembled in anticipation of trial and litigation.

Petitioner did not and cannot prove that he has a substantial need for Lott's work-product, or that he would suffer undue hardship without it. Petitioner has the alternate means of defending against Lott's claim by using the evidence presented at trial to counter Lott's claim. What Petitioner cannot do now, though, is deny the impact of the evidence hidden by the State at trial. No doubt that makes Petitioner's job difficult, but that hardly amounts to the type of "need" and "hardship" that justifies giving him copies of Lott's trial and post-conviction counsels' files.

2.6 PETITIONER'S "FLOODGATES" ARGUMENT OPENS THE OTHER WAY – IF NEW PRIVILEGE EXCEPTIONS ARE RECOGNIZED HERE, THEY WILL CUT INROADS ACROSS THE LEGAL LANDSCAPE.

Petitioner worries that the Sixth Circuit decision will open the floodgates for frivolous innocence claims. That is wrong for several reasons, not the least of which is the fact that the Sixth Circuit simply enforced existing law, and under existing law, the courts have not seen a flood of frivolous innocence claims before or after Schlup.

However, a legitimate worry is that Petitioner's arguments threaten a flood of discovery claims in all cases where a litigant can claim one might find useful information in opposing counsel's files, or by deposing opposing counsel.

The principles of privilege law do not allow Petitioner to ask for just one small exception in circumstances only like those presented here. Privileges cannot be respected only for some cases, and completely abandoned in others. As the Sixth Circuit said: "If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to delineate the scope of the privilege in ways that are predictable and certain." Petitioner's App. p. 7.

Moreover, there is no principled way to distinguish Petitioner's arguments from applying to all other privileges long recognized in our justice system. As the Sixth Circuit noted:

> If the attorney-client privilege should fail due to the assertion of innocence by a man who has confessed to his attorney, it is difficult to conceive why the privilege determination would be different for a criminal defendant who pleads not guilty. ... The focus on actual innocence "does not modify the essential meaning of 'innocence.'" Schlup, 513 U.S.at 328 (noting that it is firmly established that "the line between innocence and guilt is drawn with reference to a reasonable doubt"). The fact that the habeas petitioner is proceeding in civil rather than criminal court and now bears the burden of proof is largely insignificant to the rules of privilege. Swidler & Berlin v. United States, 524 U.S. 399, 408-09 (1998) ("[T]here is no case authority for the proposition that the privilege applies differently in criminal and civil cases.").

Petitioner's App. pp. 17-18.

The fact that the defendant at trial is in a defensive stance at trial and in an affirmative stance in habeas, where he bears the burden of proof, makes no material difference in Petitioner's "relevancy" argument. Many individuals who plead not guilty at arraignment are in fact guilty, and deposing their attorneys and reviewing counsel's files may well help the prosecution counter that plea at trial. And even if a not guilty plea did not trigger Petitioner's

logic, it seems certain to apply when a criminal defendant raises an affirmative defense. When the defendant bears the burden, the prosecution would find support for piercing privilege in Petitioner's theory that privilege is pierced when it is possible opposing counsel may know of facts that weaken his client's position, but which are not otherwise subject to disclosure. It would be anathema to our system of adversarial justice to allow a prosecuting attorney to essentially deputize a defendant's counsel. Petitioner's argument invites just such an outcome – one that threatens to convert our adversarial system into an inquisitional system without any privileges.

Habeas respondents defend trial level convictions. If this Court gives the government the right to pierce privilege in habeas litigation because it might find facts helpful to sustain a conviction, then defense lawyers at trial will surely argue that they are entitled to pierce the prosecution's privileges to find facts that might help avoid an unwarranted conviction.

This case cannot be distinguished from civil cases more generally, where it is common for litigants to assert that their positions are factually truthful. Opponents in such cases would no doubt ask for discovery on the theory that opposing counsel may have inside information helpful for determining the truth of the matter asserted. Under Petitioner's argument, any civil litigant averring a fact would implicitly waive privilege to the extent necessary for his adversary to defend the claim by accessing privileged information. It would, after all, always be helpful to know whether your adversary had contradicted himself to his attorney.

If Petitioner's logic is embraced, transactional attorneys can be haled into court when the true meaning of a contractual agreement is needed; litigators can be deposed when class-action plaintiffs want to know how product liability defendants described their predicaments to their lawyers; and nothing will be sacred when defamation defendants raise the affirmative defense of

truth. Or consider a breach of contract claim, where one of the parties disputes that there was a meeting of the minds. In search of relevant evidence, could each party depose opposing counsel in an attempt to fish for statements made by the attorney's client that are inconsistent with that party's position?

The precise reach of Petitioner's argument cannot be divined. But this much is certain: were this Court to adopt Petitioner's argument, the decision would show up in any number of cases where one party wants to see an opponent's privileged material. As the Sixth Circuit observed:

> Permitting this order to stand would place in jeopardy not only the attorney-client privilege, but also other important privileges such as the privilege between husband and wife, the privilege between patient and psychiatrist, or even the privilege between the penitent and their clergy. Since there is no linkage between the implied waiver ruling and the nature of the privileged relationship, there would be no logical reason to limit the ruling solely to the attorney-client relationship.

Petitioner's App. p. 17.

This Court should leave undisturbed the Sixth Circuit's conclusion that Petitioner has no basis for piercing Lott's privileges.

CONCLUSION.

The Court should deny Petitioner's petition for certiorari.

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Supreme Court, U.S.
FILED
MAR 2 0 2006
OFFICE OF THE CLERK

No. 05-962

In the Supreme Court of the United States

MARC HOUK, Warden,

Petitioner,

v.

GREGORY LOTT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The petition showed that the decision below merits immediate review for four reasons. First, the decision below, which categorically forecloses implied waiver of an "actual innocence" claimant's attorney-client and work-product privileges, is inconsistent with the Court's admonition that a court entertaining an "actual innocence" claim must consider it "in light of all the evidence" relevant to the claimant's guilt or innocence. *Schlup v. Delo*, 513 U.S. 298, 328 (1995). Second, the Sixth Circuit's ruling permits habeas petitioners who are asserting actual innocence claims to hide the most relevant evidence regarding their innocence. Third, the ruling threatens to undermine the finality of state convictions, as it increases the likelihood that a petitioner who is actually guilty could successfully claim actual innocence. Finally, the ruling below muddies the law of implied waiver of attorney-client privilege, as case law suggests that an implied waiver of privilege is appropriate where a claimant has directly put privileged material at issue by his contentions—but the decision below disagrees.

Lott fails to respond meaningfully to any of these concerns. Instead, his argument proceeds from the flawed assumption that this is an ordinary, run-of-the-mill habeas claim. But it is not. Rather, as the petition showed, an actual innocence claim, to the extent it even exists in the context in which Lott asserts it, is unique in all of habeas jurisprudence. Far from merely asking whether a defendant is being held in violation of the Constitution—the typical habeas inquiry—an actual innocence claim requires a searching review of "all" the available evidence to determine the claimant's innocence. Accordingly, the State ought to have access to the most relevant evidence pertaining to that inquiry.

The unique nature of an actual innocence claim also forecloses Lott's argument that recognizing an implied waiver of the attorney-client and work-product privileges

here would undermine evidentiary privileges elsewhere. It is only because of the extraordinary nature of the claim that the ordinary limitations on evidence admissibility are put aside. Thus, the waiver analysis is inherently self-limiting.

In any event, whether or not Ohio is correct on the merits, review is desperately needed here because States and habeas petitioners alike need to know the ramifications that an actual innocence claim holds for the claimant's attorney-client and work-product privileges. In particular, both groups of litigants need to know what a review of "all the evidence" regarding the claimant's factual innocence entails.

For the above reasons and those in the petition, Ohio urges the Court to review this case.

A. The unique nature of actual innocence claims necessarily alters the usual rules of evidentiary admissibility, including the scope of the claimant's otherwise applicable privileges.

1. As the petition showed, an implied waiver of an actual innocence claimant's attorney-client and work-product privileges is appropriate because of the unique way that an actual innocence claim works as a means to overcome a final conviction and sentence. Ohio Pet. at 17–24. Unlike a criminal defendant before trial, who is presumed innocent, an actual innocence claimant like Lott comes before the habeas court with at least a "strong," if not conclusive, presumption of guilt. *Schlup*, 513 U.S. at 326 n.42. The inquiry focuses on the claimant's factual innocence, as opposed to "mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Courts entertaining such claims must consider "all the evidence" relevant to the claimant's factual innocence. *Schlup*, 513 U.S. at 328; *Bousley*, 523 U.S. at 623–24. In pursuing such extraordinary relief, claimants should not be permitted to rely on their best evidence of innocence while they simultaneously hide the evidence most relevant to their specific contentions.

In response, Lott fails to come to terms with the extraordinary nature of an actual innocence claim and its corresponding alteration of the usual litigation rules about the evidence that may be considered.[1] Lott attempts to minimize *Schlup*'s abridgement of the usual rules of evidentiary admissibility, noting that the Court there did not hold that an actual innocence claimant waives the attorney-client privilege. Lott Opp. at 9–11. Although the Court in *Schlup* did not expressly address the issue of implied waiver of a claimant's privilege, the Court then did not need to do so. But the Court's admonition to consider "all the evidence" relevant to a petitioner's factual guilt or innocence does not exclude—and, fairly read, encompasses—the claimant's relevant privileged material. *Schlup*, 513 U.S. at 327–28; see also Pet. App. at 22a–24a (Boggs, C.J., dissenting).

Thus, when a petitioner asserts his factual innocence as a sword to strike down his otherwise final conviction or sentence, he should not be able simultaneously to shield privileged material that relates directly to his contentions in

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[1] While all actual innocence claims are extraordinary, Lott's claim is especially complicated, because he apparently seeks to create a new type of "innocence" claim—i.e., a type never recognized by any court. Lott insists that his claim is not a free-standing innocence claim of the type discussed in dicta in *Herrera v. Collins*, 506 U.S. 390, 417 (1993), see Lott Opp. at 5. Instead, Lott's second habeas petition and other supporting papers filed in the district court indicate that Lott seeks to create some sort of hybrid *Schlup* claim, which does not exist. In his application to file a second habeas petition, at page 3, Lott insisted that he had not raised an actual innocence claim in his first habeas petition, either as a "free-standing" claim or as a gateway to excuse the defaulted claim under *Brady v. Maryland*, 373 U.S. 83 (1963). But Chief Judge Boggs disputed that point when he dissented from the order granting Lott permission to file his second habeas petition. See Pet App. at 89a (objecting that "Lott briefed his *Brady* and actual innocence claims in his first appeal of the habeas denial to this court"); Ohio Pet. at 20 n.2. While Ohio disputes that a free-standing innocence claim, or a hybrid *Schlup* claim of the sort Lott asserts here, even exists, Ohio must defend against Lott's amorphous claim in his second habeas petition. Ohio sought the discovery below for that purpose.

support of that claim. To hold otherwise would prevent the State from defending the judgment against a claimant's new factual contentions, which, as here, are often asserted many years after the original criminal trial.

In the end, the parties' dispute over privilege centers primarily, if not wholly, on our dispute over whether an actual innocence claim is, indeed, a sword that gives special benefits to a habeas petitioner. That is so because Lott admits, as he must, the abstract principle that criminal defendants cannot have it both ways by using swords as shields. In particular, he notes that, where ineffective-counsel claims are raised, "it would be unfair for a defendant to assert that his attorney's conduct immunizes him from liability without allowing his adversaries to know anything about that conduct." Lott Opp. at 13–14. But Lott insists that an actual innocence claim is different, such that it does not have the same effect.

To be sure, a *Schlup*-style actual innocence claim may differ from an ineffective counsel claim in that a *Schlup*-type claim triggers a procedural benefit, and not a substantive right to habeas relief—but both claims are undoubtedly similar in that each gives a claimant an affirmative benefit, or sword, and not just a defensive benefit, or shield. A claimant who has exhausted and defaulted all claims, and has no other basis for a successive petition, can invoke actual innocence to obtain the right to have his new claims reviewed. Surely that is a sword-style benefit—so it must have the same effect.

And an innocence claim is even more like an ineffectiveness claim when that claim is asserted as a basis for substantive relief and not just for procedural advantage. And that is the case for so-called *Herrera* claims, if they exist. More important, Lott's newly minted claim is one for substantive relief, as he asserts that "[u]nlike *Schlup*, Lott advances a *substantive* claim for relief based on proof of his actual innocence that lies in facts that were withheld in

violation of *Brady*." Lott Mandamus Pet. at 20 (emphasis added); cf. *id.* ("[Lott] is not simply arguing that *Schlup*'s gateway permits this Court to address the merits of a *Brady* claim.").

2. For similar reasons, Lott is surely wrong when he suggests that only evidence supporting his innocence claim may be considered in determining his actual innocence. See Lott Opp. at 12 ("The analytical focus should fall on the question whether, in light of the *Brady* evidence of innocence, any reasonable factfinder would have found Lott guilty of the underlying offense."). Indeed, in the courts below, Lott suggested that he was not required to show his factual innocence, notwithstanding the Court's cases so holding. See Lott's Sur-Reply to Petitioner's Traverse at 1–2 (suggesting that the question for review was different from whether Lott has proven that he is in fact innocent); Ohio Pet. at 20 n.2. Lott's views in this regard cannot be squared with *Schlup*'s all-the-evidence mandate, 513 U.S. at 328, or *Bousley*'s reiteration that the focus of such review is on the claimant's factual innocence, 523 U.S. at 623–24. See also Ohio Pet. at 20 n.2.

3. Lott's position here is also rooted in his apparent, but erroneous, belief that a court entertaining an actual innocence claim should not consider evidence obtained by the State after a petitioner's conviction. See Lott Opp. at 11 ("While *Doe* [*v. Menefee*, 391 F.3d 147 (2d Cir. 2004)] and *Hamilton* [*v. Miller*, 292 F. Supp. 2d 437 (E.D.N.Y. 2003)] sanctioned the use of evidence that may not have been admissible at trial, neither court relied on any evidence that had been obtained by the State after the petitioner had been convicted . . . ."). But that view is surely mistaken, as both the majority and dissenting opinions in *Bousley* demonstrate. See 523 U.S. at 624 ("[t]he Government is not limited to the existing record to rebut any showing that petitioner might make."); cf. *id.* at 631 (Scalia, J., dissenting) ("As the Court's opinion today makes clear, . . . the Government is permitted to

supplement the trial record with any additional evidence of guilt . . . and [if Bousley introduces evidence showing that he did not "use" a firearm in committing the crime,] *the Government, eight years after the fact, will have to find and produce witnesses saying that he did.*") (emphasis added). See also, e.g., *House v. Bell*, 386 F.3d 668, 681 (6th Cir. 2004), *cert. granted on other grounds*, 125 S.Ct. 2991 (2005) (detailing evidentiary-hearing testimony of the state's blood expert, not presented at the original criminal trial, offered to refute the petitioner's exculpatory theory).

4. Curiously, Lott erroneously contends that States will not be prejudiced by lack of access to an actual innocence claimant's privileged material bearing directly upon a claimant's contentions, because States will have the trial record and other pre-conviction evidence upon which to rely. Lott Opp. at 8. Once again, Lott's contention misapprehends the extraordinary nature of the claim he asserts. An actual innocence claim goes beyond the usual litigation rules and ordinary judicial remedies, as a last-ditch effort to undo a conviction and sentence on the basis that the claimant is entirely innocent as a factual matter.

In this case, apart from the evidence of Lott's guilt in the trial record, Lott's confession to a police detective would undermine his innocence claim. But Lott now asserts that he never confessed at all. Consequently, in pressing his innocence claim, Lott should not be permitted to hide any privileged material that is relevant to his recent contention that his confession was totally fabricated and that he never admitted his guilt. If Lott is permitted to do just that, the State will be prejudiced in defending Lott's conviction against his *new* claim, as the trial record does not contain Lott's confession. It was suppressed on Sixth Amendment grounds.

And, as Lott has impliedly waived the attorney-client and work-product privileges, Federal Rule of Civil Procedure

26(b) does not bar production of his former lawyer's documents relating to the issue of whether or not Lott confessed to his role in the crime. See *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731–32 (8th Cir. 2002) ("Because we find that [claimant] has waived the work product privilege in this case, we need not address whether the Rule 26(b)(3) standard of substantial need an undue hardship has been shown by [opponent]."). Cf. Lott. Opp. at 17–18.

Equally important, Lott's argument about no harm to the State misses the point that this litigation itself is a harm to the State, and the same will be true in similar cases—hence the need for review here. That is, the State pays a cost, both in finality and in actual litigation costs, when it is forced to defend against actual innocence claims, even if it wins them all. And the decision below will likely increase the frequency of such claims, as it allows inmates to claim innocence while hiding contrary evidence. Once inmates know that *all* the evidence will be put on the table, the gain from bogus claims will be lessened, and thus their frequency will fall. Meanwhile, those rare, truly innocent claimants will have nothing to fear from a true all-the-evidence regime.

5. Finally, Lott misses the point when he stresses the importance of the attorney-client privilege in the adversary system generally and noting that implied waivers ordinarily are narrowly construed. See Lott Opp. at 6–7, 12–16. The Warden does not disagree that the attorney-client and work-product privileges serve important roles in the adversary system, or that courts generally are chary of broad implied waivers of the privilege. But in the context of an actual innocence claim, the habeas petitioner seeks to overturn an otherwise final conviction and sentence based on his contention that he is "entirely innocent," so his incarceration (or execution) would work a "fundamental miscarriage of justice." *Schlup*, 513 U.S. at 324–25. As the dissenting judge below observed, "[f]or a petitioner to show he is entirely

innocent, and that he is truly deserving of extraordinary relief, one would think that [the petitioner] must be willing to test his innocence against literally all the evidence, including whatever is protected by privilege." Pet. App. at 24a (Boggs, C.J., dissenting).

B. The extraordinary nature of an actual innocence claim ensures that a claimant's implied waiver of the attorney-client and work-product privileges will not erode the privilege in other areas of the law.

Lott's concern that an implied waiver of privilege by an actual innocence claimant would undermine the attorney-client privilege in other litigation, civil and criminal, is misplaced. See Lott Opp. at 19–21. As explained above (at 2), an actual innocence claim is unique in judicial proceedings. As the dissent below recognized, a "claim of actual innocence thus places unique demands on the attorney-client privilege, based on values that do not transfer to other areas of law." Pet. App. at 27a (Boggs, C.J., dissenting). Actual innocence claims invoke a form a judicial clemency, a world in which the typical litigation rules are set aside in a quest for some ultimate justice.

Consequently, Lott is mistaken in suggesting that recognizing an implied waiver here would imperil the privilege in civil cases outside of federal habeas actual innocence claims. Lott points to no other civil claim where the governing law directs the court entertaining the claim to consider "all the evidence"—including evidence that would be inadmissible at trial, and evidence that is claimed to have been obtained in an unconstitutional manner.

Nor is Lott on solid ground when he asserts that implied waiver of privilege for an actual innocence *habeas* claim would jeopardize the privilege for criminal defendants at trial. See Lott Opp. at 19–20. Nothing in *Schlup* or the Court's other cases discussing actual innocence claims suggests that the extraordinary remedy and mode of analysis

described in those cases would apply outside of that limited context. Cf. 513 U.S. at 324–25 (in asserting an actual innocence claim, petitioner argues that he is "entirely innocent," and thus it would be a "fundamental miscarriage of justice" for him to continue to be incarcerated notwithstanding his otherwise-final conviction); *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992) (considering claim that petitioner was "actually innocent of the death penalty"); *Herrera*, 506 U.S. at 417 (1993) (assuming, without deciding, that a free-standing actual innocence claim might exist).

The prospect of an implied waiver of the privilege in the limited actual-innocence-habeas-claim context also would not undermine the purposes of the privilege for criminal defendants at trial. As Judge Boggs noted in his dissent below, "[i]t frankly blinks at reality to believe that a criminal defendant will be less candid with his attorney because of his possible assertion of a claim that would likely only be raised after conviction, a full course of appeals in the .ate courts, post-conviction review in the state courts, and federal habeas review." Pet. App. at 28a.

C. Review is needed here because States and federal habeas petitioners need to know the ramifications of an actual innocence claim for the claimant's attorney-client and work-product privileges.

At bottom, while Lott maintains that the Sixth Circuit decision below got it right on the merits, he does not seriously dispute that the issue raised in the petition—namely, the effect of an actual innocence claim on the claimant's attorney-client and work-product privileges—is an important one for both States and federal habeas petitioners. As actual innocence claims become more frequent in federal habeas, States and would-be claimants need to know the parameters of the *Schlup*-mandated review of "all the evidence" regarding a claimant's factual innocence.

Accordingly, States and habeas petitioners need this Court's guidance on that issue now, even before the other federal courts of appeals address it.

For all these reasons, Ohio urges this Court to review this case, and to reverse the Sixth Circuit's decision below.

CONCLUSION

For the above reasons, the petition should be granted.

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March 2006